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COMPRISING

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1874-1884 INCLUSIVE;

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**With Copious Notes.**

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OF LINCOLN'S INN, ESQ., BARRISTER-AT-LAW, EDITOR OF THE 6TH AND 7TH EDITIONS OF  
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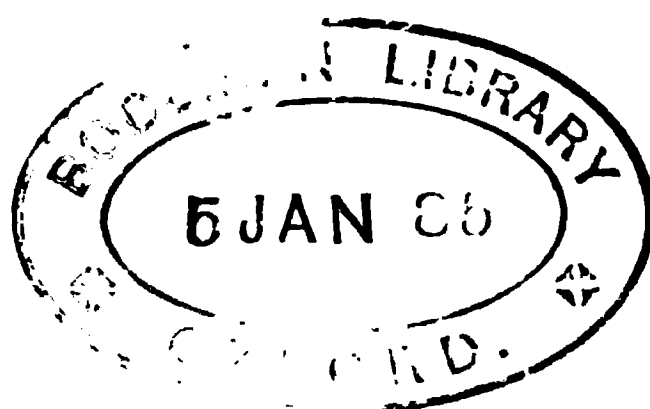
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1884.



## PREFACE TO THE SECOND EDITION.

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IN this edition the principal feature of the First Edition—viz., the grouping together of provisions *in pari materia*—has been retained. It is thought that the convenience of finding all the statutory provisions relating to a particular subject in one place will outweigh the slight risk of confusion arising from the interpolation of sections of one statute in the body of another. In order, however, to reduce this risk as much as possible, all the interpolated sections have been enclosed in square brackets and indented. Where the interpolated sections form parts of recent statutes, they will also be found, in their proper places, in the Acts of which they form part. For instance, the provisions of the Conveyancing Act, 1881, which relate to the rights of vendors and purchasers under an open contract will be found in their natural place at p. 212, *et seq.*, and they are also interpolated after sect. 2 of the Vendor and Purchaser Act, 1874, at p. 190. Where, however, they form only a small part of older statutes, they have simply been inter-

polated in the principal recent statute relating to the same subject-matter. For instance, the provisions of the Fines and Recoveries Act, and other Acts relating to the alienation of property by married women, will only be found immediately after sect. 5 of the Married Women's Property Act, 1882.

Repealed provisions have been inserted, only, where they are still of practical importance, and have been, invariably, printed in italics.

Head-lines have been added to the sections of the earlier as well as of recent statutes; and in some cases the marginal notes have been re-written.

The Act to amend the law of Real Property and Lord St. Leonards' Acts, 1859 and 1860, and the Improvement of Land Act, 1864, have been so materially affected by recent legislation that they have been included in the present collection.

The cases are brought down to the end of the Long Vacation, 1884, and the table of cases contains the now indispensable references to contemporaneous reports. These references are, in some instances, to more recent reports than those in the foot notes.

H. G.

4, NEW SQUARE, LINCOLN'S INN,  
*November, 1884.*



## PREFACE TO THE FIRST EDITION.

---

THE statutes relating to Real Estate, which were passed during the years 1874—1877, made considerable alterations in the law, not only by the enactment of entirely new provisions, but also by the amendment of previously existing statutes.

The main object of the following pages is to show clearly the effect of the recent legislation by giving, in a consolidated form, such of the provisions of the amended statutes as are still in force, and the provisions of the more recent statutes. A similar plan has been adopted by the Legislature in the Settled Estates Act, 1877.

The Land Transfer Act has hitherto had so little effect on general practice that it has been omitted, with the exception of the two sections which amend the Vendor and Purchaser Act, 1874. The Improvement of Land Act, 1864, has also been omitted, although it is to be read with the Limited Owners' Reservoirs and Water Supply Further Facilities Act, which is printed in full.

The author has ventured to re-write the marginal notes to some of the statutes.

The book, as originally projected, was intended principally for the use of students; but the author has endeavoured to give the result of the decided cases in such a form as also to be of service to the profession generally.

As a rule, only one reference to the full report of each case has been given, together with a reference to the analysis of the same case in "Notanda," where other references will be found.

The cases are brought down to the Long Vacation, 1878.

H. G.

2, OLD SQUARE,  
LINCOLN'S INN.

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## LIST OF ABBREVIATIONS.

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A. & E.	{ Adolphus and Ellis's Reports.
Ad. & El.	{ Ambler's Reports.
Amb.	
Ap. Ca.	{ Law Reports (present series) Appeal Cases.
Ap. Cas.	
App. Ca.	
Atk.	{ Atkyns' Reports.
B.	{ Beavan's Reports.
B. & A.	{ Barnwell and Adolphus' Reports.
B. & Ad.	{ Barnwall and Alderson's Reports.
B. & Al.	{ Barnwall and Cresswell's Reports.
B. & C.	{ Banning on the Limitation of Actions.
Ban. Lim.	{ Beatty's Cases in Chancery.
Beat.	{ Best and Smith's Reports.
Best & Sm.	{ Bingham's Reports.
Bing.	{ Bingham's New Cases.
Bing. N. C.	{ Bligh's New Reports.
Bli. N. R.	{ Brown's Chancery Cases.
Bro. C. C.	{ Brown on the Statutes of Limitation.
Br. Lim.	{ Burrow's Reports.
Burr.	{ Burton on the Law of Real Property.
Burton, R. P.	{ Carrington and Kirwan's Reports.
Car. & Kir.	{ Law Reports (present series) Chancery Division.
Ch. D.	{ Clark and Finelly's Reports.
Cl. & F.	
Cl. & Fin.	
Col.	{ Collyer's Chancery Cases.
Coll.	
C. C. C.	{ Common Bench Reports.
C. B.	{ " " " (New Series.)
C. B. N. S.	
C. B. (N. S.)	
C. & M.	{ Crompton and Meeson's Reports.
Cr. & M.	
C. & P.	{ Carrington and Payne's Reports.
Cons. Ord.	{ Consolidated Orders.
Con. & Law.	{ Connor and Lawson's Reports.
Coop.	{ Cooper's Reports.
Cop. Tit. Deeds	{ Copinger on Title Deeds.



Cr. M. & R.	Crompton, Meeson, and Roscoe's Reports.
Darb. & Bos. Lim.	Darby & Bosanquet on the Statutes of Limitation.
Dart V. & P.	{ Dart on Vendors and Purchasers.
V. & P.	
Dav.	{ Davidson's Precedents in Conveyancing.
Dav. Conv.	
De G. F. & J.	{ De Gex, Fisher, and Jones' Reports.
D. F. J.	
De G. & J.	{ De Gex and Jones' Reports.
De G. J. & S.	
D. J. & S.	{ De Gex, Jones, and Smith's Reports.
D. J. S.	
D. M. G.	De Gex, Macnaghten, and Gordon's Reports.
De G. & S.	De Gex and Smale's Reports.
Doug.	Douglas' Reports.
Dow.	Dow's Reports.
Dow. & Low.	Dowling and Lowndes' Reports.
Dow. & R.	Dowling and Ryland's Reports.
Dowl. P. C.	Dowling's Practice Cases.
Drew.	Drewry's Reports.
Dr. & S.	{ Drewry and Smale's Reports.
Dr. & Sm.	
D. & Wal.	Drury and Walsh's Reports
Dr. & War.	{ Drury and Warren's Reports.
Dru. & War.	
East.	East's Reports.
E. & Bl.	{ Ellis and Blackburn's Reports.
El. & Bl.	
El. & El.	Ellis and Ellis's Reports.
Ex.	Exchequer Reports (Welsby, Hurlstone, and Gordon).
Fearne, C. R.	Fearne on Contingent Remainders.
F. & F.	Foster and Finlason's Reports.
G. & D.	Gale and Davison's Reports.
Giff.	Giffard's Reports.
H.	Hare's Reports.
Har. & R.	Harrison and Rutherford's Reports.
Hayes	Hayes' Reports.
H. & M.	Hemming and Miller's Reports.
H. L. C.	{ House of Lords Cases.
H. L.	
H. & C.	Hurlstone and Coltman's Reports.
H. & N.	Hurlstone and Norman's Reports.
H. & T.	Hall and Twells' Reports.
I. Ch. R.	Irish Chancery Reports.
I. Ch. R. N. S.	" " " (New Series).
I. C. L. R.	Irish Common Law Reports.
I. Eq. R.	Irish Equity Reports.
I. L. R.	Irish Law Reports.
I. R. C. L.	Irish Reports—Common Law.
I. R. Eq.	Irish Reports—Equity.
Jac.	Jacob's Reports.
Jac. & W.	Jacob and Walker's Reports.
Jeb. & Sy.	Jebb and Syme's Reports.
J. & H.	Johnson and Hemming's Reports.
Joh.	Johnson's Reports.
J. & La T.	{ Jones and La Touche's Reports.
Jo. & La T.	

Jur.	The Jurist Reports.
Jur. N. S.	{ „ (New Series.)
Jur. (N. S.)	
K.	Kay's Reports
K. & J.	Kay and Johnson's Reports.
Keen	Keen's Reports.
L. J.	Law Journal Reports.
L. J. N. S.	{ Law Journal Reports (New Series.)
L. J. (N. S.)	
L. R. Ch.	Law Reports (1865—1875), Chancery Appeals.
L. R. C. P.	„ (1865—1875), Common Pleas Cases.
L. R. Eq.	„ (1865—1875), Equity Cases.
L. R. Ex.	„ (1865—1875), Exchequer Cases.
L. R. H. L.	„ (1865—1875), English and Irish Appeals.
L. R. Ir.	„ (Ireland.)
L. R. P. C.	„ (1865—1875), Privy Council Appeals.
L. R. Q. B.	„ (1865—1875), Queen's Bench Cases.
L. T.	Law Times Reports.
L. T. N. S.	{ „ (New Series.)
L. T. (N. S.)	
L. & T.	{ Longfield and Townsend's Reports.
Long. & Town.	
M. & G.	Macnaghten and Gordon's Reports.
Man. & G.	{ Manning and Grainger's Reports.
Man. & Gr.	
Man. & Ryl.	Manning and Ryland's Reports.
M. & S.	Maule and Selwyn's Reports.
M. & W.	Meeson and Welby's Reports.
M. & C.	{ Mylne and Craig's Reports.
M. & Cr.	
M. & K.	Mylne and Keen's Reports.
Mer.	Merivale's Reports.
Mo.	Moore's Reports.
Mo. & P.	Moore and Payne's Reports.
M. & S.	{ Moore and Scott's Reports.
Mo. & S.	
M. P. C. C.	Moore's Privy Council Cases.
N. R.	New Reports.
Nev. & Man.	Neville and Mannings' Reports.
Peake N. P. C.	Peake's Cases at Nisi Prius.
P. & Dav.	Perry and Davison's Reports.
Phil.	{ Phillips' Chancery Cases.
Phil. C. C.	
Price	Price's Reports.
Q. B.	Queen's Bench Reports (Adolphus and Ellis, New Series).
Q. B. D.	Law Reports (present series), Queen's Bench Division.
Reg.	Judge's Regulations under Consolidated Orders.
Rus.	Russell's Reports.
Sause & S.	Sause and Scully's Reports.
R. S. C.	Rules of the Supreme Court, 1875.
S. & G.	Stone and Graham's Reports.
Sch. & L.	{ Schoales and Lefroy's Reports.
Sch. & Lef.	
Scott.	Scott's Reports.
Scott N. R.	Scott's New Reports.

Sim.	Simon's Reports.
Sim. (N. S.)	Simon's Reports (New Series).
Sim. & Stu.	Simon and Stuart's Reports.
Sm. L. C.	Smith's Leading Cases.
S. J.	{ Solicitors' Journal.
Sol. J.	
Sugd. Pow.	Sugden on Powers.
Sugd. R. P.	Sugden (Lord St. Leonards) on Real Property Statutes.
Sugd. V. & P.	Sugden (Lord St. Leonards) on Vendors and Purchasers.
Taunt.	Taunton's Reports.
T. R.	Term Reports (Durnford and East).
Tyrw.	Tyrwhitt's Reports.
V. & P.	Dart on Vendors and Purchasers.
Vent.	Ventris' Reports.
Ver.	Vernon's Reports.
V. & B.	{ Vesey and Beames' Reports.
Ves. & B.	
Ves.	Vesey Junior's Reports.
Ves. Sr.	Vesey Senior's Reports.
W. N.	Weekly Notes.
W. R.	Weekly Reporter.
Y. & C. Ch.	Young and Collyer's Cases in Chancery.
Y. & C.	{ Young and Collyer's Reports (Exchequer).
Y. & C. (Ex.)	
You. & J.	Young and Jervis' Reports.



## ADDENDA ET ERRATA.

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Page 91. As to circumstances which entitle a legatee to more than six years' arrears of interest, see *Re Blachford; Blachford v. Worsley* (a).

Page 182. Where executors employ an agent and loss ensues, the burden of showing that he was improperly employed is on the persons who seek to make the executors liable (b).

Page 276. *Appointment of new Trustees.* Add reference to *Cecil v. Langdon* (c) at end of note 8 to s. 31 of C. A. 1881.

Pages 190, 196 and 199. *Rights under Open Contract.* It has recently been held by PEARSON, J., that although a purchaser under an open contract is entitled to a 40 years' title, the effect of s. 6 (3) of the C. A., 1881, is to preclude him from requiring an abstract, except at his own expense, of any of the title deeds which may not be in the vendor's possession (d). Intending purchasers should, therefore, be careful to stipulate expressly for an abstract at the vendor's expense.

- |      |     |   |   |   |
|------|-----|---|---|---|
| Page | 7   | note (l)                                    | } | for 4 D. M. G. read 2 D. M. G.                    |
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| "    | 7   | " (i)                                       | } | for 14 M. & W. read 2 Bing. N. C. 679.            |
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| "    | 35  | " (s)                                       | } | for 7 C. B. read 15 Sim.                          |
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| "    | 63  | " (l)                                       | } | for 21 B. read 24 B.                              |
| "    | 90  | " (s)                                       |   |   |
| "    | 93  | " (r)                                       | } | for 2 Dr. & War. read 3 Dr. & War.                |
| "    | 94  | " (z)                                       |   |   |
| "    | 99  | " (p & q)                                   | } | for 3 P. C. read 1 P. C.                          |
| "    | 108 | line 7                                      |   |   |
| "    | 109 | " 7   | } | for 1878 read 1868.                               |
| "    | 109 | " 19  |   |   |
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| "    | 362 | " (k)                                       | } | for 22 & 23 Vict. c. 35 read 10 & 11 Vict. c. 96. |
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| "    | 383 | " (p)                                       | } | for L. R. 10 Q. B. read L. R. 10 C. P.            |
| "    | 393 | " (b)                                       |   |   |
| "    | 424 | " (c)                                       | } | for 7 Scott N. R. read 7 C. B. N. S.              |
| "    | 424 | " (h)                                       |   |   |
| "    | 427 | " (b)                                       | } | for L. R. 10 C. P. 39 read 4 C. P. D. 39.         |
| "    | 475 | <i>Re Jones</i> was affirmed on appeal (e). |   |   |

(a) 33 W. R. 11.

(b) *Re Brier; Brier v. Evison*, 33 W. R. 20.

(c) 33 W. R. 1.

(d) *Re Johnson & Tustin*, 29 S. J. 9.

(e) 26 Ch. D. 736.

# REAL PROPERTY STATUTES.



# THE STATUTES OF LIMITATION

AFFECTING

## REAL ESTATE.

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3 & 4 Will. 4, c. 27.  
3 & 4 Will. 4, c. 42, s. 3.  
7 Will. 4 & 1 Vict. c. 28.  
6 & 7 Vict. c. 54, ss. 1 and 3.  
23 & 24 Vict. c. 38, s. 13.  
36 & 37 Vict. c. 66, s. 25 (2).  
37 & 38 Vict. c. 57.

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### SUMMARY.

THE principal Statute of Limitation now in force affecting real estate is the 3 & 4 Will. 4, c. 27, which was passed in 1833, and is known as the statute of Will. 4. It was amended by the 37 & 38 Vict. c. 57, the short title of which is the "Real Property Limitation Act, 1874," and which came into operation on the 1st of January, 1879. The last-mentioned Act repeals portions of the older enactment, and is to be read with the rest of it.

Sect. 1 of the Act of 1833 is merely an interpretation clause.

Sect. 2 fixed the time of limitation as respects actions to recover real estate at twenty years from the time when the right first accrued. By s. 1 of the Act of 1874 this time is reduced to twelve years as respects actions brought after the 1st of January, 1879.



Sect. 3 of the Act of 1833 is supplementary to these provisions, and fixes the time when such right is to be deemed to have accrued in certain cases.

Sects. 4, 5, and 20 of the Act of 1833 apply to reversionary interests and other future estates. Sect. 2 of the Act of 1874 is now substituted for s. 5 of the original Act, and applies to the case of the same person being entitled to two estates in the same land—one in possession and the other in reversion.

Provisions with regard to estates tail are contained in ss. 21, 22, and 23 of the original Act. These sections are not affected by the Act of 1874, except that the time of limitation is reduced from twenty to twelve years. In effect they provide that remaindermen, whom a tenant in tail might have barred, shall be in the same position as regards the statute as if they claimed through him.

Sect. 28 of the original Act applies to the case of a mortgagee in possession, and provides that the mortgagor shall be barred by twenty years of such possession unless his right to redeem is acknowledged in the meantime. By s. 7 of the Act of 1874 twelve years is substituted for twenty.

When the mortgagor is in possession the case is taken out of s. 3 of the Act of 1833 by 7 Will. 4 & 1 Vict. c. 28, and time only runs against the mortgagee from the last payment of any portion of the principal or interest.

The relation between landlord and tenant forms the subject of ss. 7, 8, and 9 of the Act of 1833, which fix the period when time begins to run in the cases of tenancies at will, from year to year, and for a term of years respectively. The time of limitation is the same as in the case of trespassers; and s. 35 provides that the receipt of rent shall be deemed to be receipt of profits.

Under ss. 12 and 13 of the Act of 1833 the possession of one or more of several joint owners, or of a relation of the person entitled, may be adverse.

When an acknowledgment of the title of an owner against whom the statute is running is given by the person in pos-

session time will, under s. 14 of the Act of 1833, recommence to run from such acknowledgment. Sects. 28, 40, and 42 of the same Act also contain special provisions as to acknowledgments in the cases of mortgagees in possession and of moneys charged on land.

Disabilities are dealt with by ss. 16, 17, 18, and 19 of the Act of 1833, and ss. 3, 4, and 5 of the Act of 1874. Under the former, ten years further time was given to persons under any disability from the time when such disability ceased, provided that such ten years expired within forty years from the accrual of right. By the Act of 1874 the ten years is reduced to six years, and the extreme period of saving for disabilities to thirty years; while absence beyond seas ceases to be a disability. But by ss. 25 and 26 of the Act of 1833, time will not run at all in cases of express trust or concealed fraud. By s. 10 of the Act of 1874, the provision as to express trusts is repealed so far as money charged on land is concerned; but, on the other hand, s. 25 (2) of the Judicature Act, 1873, provides that no action by a *cestui que trust* against his trustee in respect of, property held upon, or any breach of, an express trust shall be barred by any Statute of Limitation. This, of course, refers to an action against the trustee personally.

Sect. 34 of the Act of 1833 provides that when the full time has run against an owner, his right and title—and not merely his remedy—shall be barred.

By s. 24 of the same Act equitable estates are to be barred in the same time as legal estates, while by s. 27 the jurisdiction of equity in cases of acquiescence and laches, where the time limited by the statute may not have run, is preserved.

Sect. 6 of the same Act provides that time shall run continuously against an administrator, as it would have done against his intestate if alive.

Advowsons and the property of spiritual and eleemosynary corporations sole are dealt with by ss. 29, 30, 31, 32, and 33 of the Act of 1833. Speaking generally, their effect is to

bar a patron by three adverse presentations or sixty years' adverse possession, and the extreme period of limitation is fixed at one hundred years. By s. 3 of 6 & 7 Vict. c. 54, these provisions are expressly extended to bishops who are also patrons. Ecclesiastical and eleemosynary corporations sole are barred by adverse possession for sixty years, or two incumbencies and six years.

These provisions are not affected by the Act of 1874.

Sect. 41 of the Act of 1833 provides that only six years' arrears of dower may be recovered, while ss. 40 and 42 deal with money charged on land, legacies, and the interest thereon. The principal money might formerly (under s. 40) be recovered within twenty years after the accrual of a right to receive the same or an acknowledgment, but arrears of interest can (under s. 42) only be recovered for six years.

Sect. 8 of the Act of 1874 reduces the time of limitation for the principal to twelve years.

Sect. 3 of 3 & 4 Will. 4, c. 42, does not strictly apply to land or money charged on land, but provides that money secured by (*inter alia*) bond or covenant may be recovered within twenty years, and arrears of interest for the whole time are recoverable. As money charged on land is often also secured by bond or covenant, the question has frequently arisen, in such cases, whether six or twenty years of interest can be recovered. There is now, also, a conflict between the Acts with respect to the principal money, the time of limitation for money charged on land being twelve years, and for money secured by bond or covenant twenty years.

Sects. 10 and 11 of the Act of 1833, take away the saving of rights formerly effected by mere entry and continual claim.

Sects. 36, 37, 38, and 39 contain provisions for the abolition of actions known as real and mixed actions.

## 3 &amp; 4 WILL. 4, c. 27.

*An Act for the Limitation of Actions and Suits relating to Real Property; and for simplifying the remedies for trying the rights thereto.*

INTERPRETATION CLAUSE.<sup>1</sup>

BE it enacted, &c., that the words and expressions herein- 3 & 4 Will.  
after mentioned, which in their ordinary signification have 4, c. 27,  
a more confined or a different meaning, shall in this Act, § 1.  
except where the nature of the provision or the context of Interpretation  
the Act shall exclude such construction, be interpreted as clause.  
follows; (that is to say,) the word "land"<sup>2</sup> shall extend to  
manors, messuages, and all other corporeal hereditaments  
whatsoever, and also to tithes<sup>3</sup> (other than tithes belonging  
to a spiritual or eleemosynary corporation sole), and also to  
any share, estate, or interest in them or any of them,  
whether the same shall be a freehold or chattel interest,  
and whether freehold or copyhold, or held according to  
any other tenure; and the word "rent"<sup>4</sup> shall extend to  
all heriots, and to all services and suits for which a distress  
may be made, and to all annuities and periodical sums of  
money charged upon or payable out of any land (except  
moduses or compositions belonging to a spiritual or eleemosynary corporation sole); and the person through whom  
another person is said to claim shall mean any person by,  
through, or under, or by the act of whom, the person so  
claiming became entitled to the estate or interest claimed, as  
heir, issue in tail, tenant by the curtesy of England, tenant  
in dower, successor, special or general occupant, executor,  
administrator, legatee, husband, assignee, appointee, devisee,  
or otherwise, and also any person who was entitled to an  
estate or interest to which the person so claiming, or some

3 & 4 Will. 4, c. 27, § 1. person through whom he claims, became entitled as lord by escheat; and the word "person"<sup>5</sup> shall extend to a body politic, corporate, or collegiate, and to a class or creditors or other persons, as well as an individual; and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing; and every word importing the masculine gender only shall extend and be applied to a female as well as a male.

Effect of interpretation clause.

<sup>1</sup> As to the general effect of an interpretation clause, see the remarks of LORD SELBORNE in *Meux v. Jacobs* (a).

What "land" includes.

<sup>2</sup> The word land in this section has been held not to include turnpike tolls (b). On the other hand a mortgage of a canal, works and rates was held to come within the statute (c). In the latter case, however, the canal itself was conveyed, while in the former the soil of the road was not.

Turnpike tolls.

But it may be remarked that mortgages of turnpike tolls—even where there was no conveyance of the road or the toll-houses—have been held to be mortgages of "hereditaments" within the Statutes of Mortmain (d), and it will be noticed that this section extends the meaning of the word "land" to "all corporeal hereditaments" . . . "or interests in them" and the word "rent" to all "periodical sums of money charged upon or payable out of any land."

Copyholds.

The Act applies to copyholds, not only as between rival claimants, whether as lords or copyholders, but also as between a lord and his tenants (e). Dower is an "interest in land" within the meaning of the Act (f). See s. 41 (g).

Dower.

Timber.

Timber appears not to be within the Act. It has been held that the right of action of a reversioner in respect of timber wrongfully cut and sold by a tenant for life was for "money had and received," and was barred in six years (h).

Tithes.

<sup>3</sup> There is an ambiguity in the word "tithes," and it may now be considered as settled that the Act is not a bar as between tithe-owner and occupier; but only as between rival claimants to an estate in (or

(a) L. R. 7 H. L. 493.

(b) *Mellish v. Brooks*, 3 B. 22.

(c) *Hodges v. Croydon Canal Co.*, 3 B. 86—89.

(d) *Knapp v. Williams*, 4 Ves. 430, n; *Howse v. Chapman*, 4 Ves. 452. See also *Carendish v. Carendish*, 24 Ch. D. 685.

(e) *Walters v. Webb*, L. R. 5 Ch. 531.

(f) *Marshall v. Smith*, 5 Giff. 37; 13 W. R. 198.

(g) *Infra*, p. 89.

(h) *Higginbotham v. Hawkins*, L. R. 7 Ch. 676.

the receipt of) tithes (i). One decision (j) inconsistent with this view, 3 & 4 Will. was disapproved of (k), and subsequently reversed (l). A tithe rent-charge is "rent" within the meaning of this section (m). 4, c. 27,  
§ 1.

<sup>4</sup> There is a singular ambiguity in the word "rent" as used in the Tithe rent-Act. In this section it is used in two senses, (1) in the sense of a rent charged upon land, i.e., a rent-charge, or "rent of inheritance;" and, (2) in the sense of a rent reserved by a lease. *Per* LORD DENMAN, C. J. (n). See also notes to ss. 2, 3, 9 and 42 (*infra*, pp. 8, 9, 14, 30 and 90). Meaning  
of "rent."

How far heriots are included in the word "rent" has given rise to Heriots much discussion. *Semble* that where a heriot or quit-rent becomes due Quit rents at intervals of more than twenty years it is not rent within ss. 1, 2 and 3. *Per* PARKE, B. (o). A distinction was drawn in *Earl Chichester v. Hall* (p) between heriots reserved by deed and heriots due by the custom of a manor. It was there said that in cases of the first description (heriot-service) time would not run from the last receipt; but from the time when the right to take a heriot accrued and was not enforced; and the same rule was held to apply to a quit-rent. At the same time it was doubted whether heriots of the second description (heriot custom) came within the statute at all; and the doubt has been confirmed by a recent case (q), in which a strong opinion was expressed that no heriots of any description are within ss. 2, 3, 34 and 42; and it was held that the failure, by a lord of the manor, to seize a heriot due by the custom, was no bar to the right of a subsequent lord to a heriot which accrued due in respect of the same lands more than twenty years later.

<sup>5</sup> The Attorney-General, the rector, the churchwardens and the overseers of a parish are not "persons" within this section (r), but the poor of a parish are (s). The Ecclesiastical Commissioners are "persons" within this section and s. 2, except in cases where they claim through an ecclesiastical corporation (t). Person.

"The Statute of Limitations has relation only to actions between The subject and subject; the Crown cannot be bound by it." *Per* CROWN BLACKBURN, J. (u). This proposition was at one time doubted (x).

(i) *Lord Shannon v. Hodder*, 2 I. L. R. 223; *Lord Shannon v. Stoughton*, 3 I. L. R. 521; *Dean, &c., of Ely v. Cash*, 15 M. & W. 617.

(j) *Dean, &c., of Ely v. Bliss*, 5 B. 574.

(k) *Skid v. Incorporated Society*, 10 I. E. R. 411.

(l) 4 D. M. G. 459.

(m) *Skid v. Incorporated Society*, 10 I. E. R. 411.

(n) *Angell v. Angell*, 9 Q. B. 355.

(o) *Owen v. De Beauvoir*, 16 M. & W. 566.

(p) 17 L. T. (Q. B.) 121.

(q) *Lord Zouche v. Dalbiac*, L. R. 10 Ex. 172.

(r) *Attorney General v. Magdalen College*, 18 B. 240, 247, 248.

(s) *Magdalen College v. Attorney-General*, 6 H. L. C. 210.

(t) *Ecclesiastical Commissioners v. Rouse*, 5 Ap. Ca. 736, 740, 745.

(u) *Rustomjee v. The Queen*, 1 Q. B. D. 491.

(x) Br. Lim. p. 248. See also 9 Geo. 3, c. 16, and 24 & 25 Vict. c. 62.

3 & 4 Will. Charities are within the statute (y), though this also has been  
4, c. 27, doubted (z).  
§ 1.

Charities.

### TIME OF LIMITATION.

3 & 4 Will. 2. *Repealed and superseded as to actions commenced*  
4, c. 27, *after 1 Jan., 1879, by s. 1 of the Real Property Limitation*  
§ 2. *Act, 1874 (a), which is as follows:* <sup>1</sup>

37 & 38 [1. After the commencement of this Act<sup>3</sup> no person shall  
Vict. c. 57, make an entry or distress, or bring an action or suit,<sup>2</sup> to  
§ 1. recover any land<sup>4</sup> or rent,<sup>5</sup> but within twelve<sup>2</sup> years next  
Time of after the time at which the right to make such entry or  
limitation distress, or to bring such action or suit, shall have first  
as regards accrued<sup>6</sup> to some person through whom he claims; or if  
land and such right shall not have accrued to any person through  
rent fixed whom he claims, then within twelve<sup>2</sup> years next after  
at twelve the time at which the right to make such entry or  
years. distress, or to bring such action or suit, shall have first  
accrued<sup>6</sup> to the person making or bringing the same.<sup>7</sup>]

<sup>1</sup> The old and new enactments are similarly worded.

<sup>2</sup> The only difference is the substitution of "twelve" for "twenty" years, and the addition of "or suit," after "action." The latter alteration appears to have been rendered unnecessary by the Judicature Act, 1875 (b). R. S. C., Ord. I. r. 1, gives the name of "action" to proceedings which were formerly known as "suits."

The following decisions upon s. 2 of the old Act will apply equally to the substituted section.

3 ex- <sup>3</sup> This section is not restricted, but merely explained, as regards  
plains but doubtful cases, by s. 3; and therefore a case may be within s. 2, although  
does not the time of accrual of right is not provided for by s. 3 (c).  
restrict § 2.

Copyholds. <sup>4</sup> A suit by the heir of a copyholder to enforce admittance against the  
Seizure lord who had seized *quousque* forty years before, was held to be an  
*quousque* action to recover land within this section, although it was contended on  
behalf of the plaintiff that a seizure *quousque* did not destroy his right

(y) *Attorney-General v. Magdalen College*, 6 H. L. C. 189; *Commissioners of Donations v. Wybrants*, 2 J. & La. T. 182.

(z) *Incorporated Society v. Richards*,

1 Dr. & War. 287.

(a) 37 & 38 Vict. c. 57.

(b) 38 & 39 Vict. c. 77.

(c) *James v. Saller*, 3 Bing. N. C. 552-3.

as an absolute forfeiture would have done (d). A foreclosure action is an action to recover land under this section (e). An order for sale on the petition of an owner is not "an action to recover land" so as to prevent the operation of the statute in favour of third persons (f). *Semble* that a tenant in tail in possession is barred by this section and not by s. 21 (g).

3 & 4 Will.  
4, c. 27,  
§ 2.  
37 & 38  
Vict. c. 57,  
§ 1.

Tenant in  
tail.

Where the Ecclesiastical Commissioners claim through an Ecclesiastical corporation sole to whom a right of action has accrued, they have the same time within which to bring an action as their predecessor in title would have had under s. 57. *Semble* that in other cases actions by the Ecclesiastical Commissioners are within this section (h).

"I think it clear from repeated consideration of it, that 'rent' in the sense in which it is spoken of in the second section means rent of inheritance, and that it does not mean rent reserved by a lease, for example, or rent in the common and ordinary form of a render of rent for property." *Per* LORD ST. LEONARDS (i). This section therefore has no application between landlord and tenant as such (k). Their rights under the Act are governed by s. 42, *infra* (l). This follows from the doctrine that the possession of a tenant is not adverse to, but identical with, his landlord's possession (m). But see, on this point, notes to ss. 3, 7, 8 and 9 (n). A penal rent is not within this section (o).

Meaning  
of "rent"  
in these  
sections.

Landlord  
and  
tenant.

As to when the right first accrues in certain cases, see s. 3 (p).

The Court will compel a purchaser to accept a title depending upon adverse possession under the statute, established by affidavit or parol evidence, because the estate itself (q) and not merely the remedy is barred (r).

Where a writ has been issued and allowed to expire, the Court will not renew it, if the time limited by the statute has expired in the meantime (s).

(d) *Walter v. Webb*, L. R. 5 Ch. 531. See also *Rex v. Ajardsley*, 5 Dow. 19.

(e) *Harlock v. Ashberry*, 18 Ch. D. 229; 19 Ch. D. 539.

(f) *Re Tazfe's Estate*, 1 L. R. Ir. 387.

(g) *Earl of Abergavenny v. Brace*, L. R. 7 Ex. 153-4.

(h) *Ecclesiastical Commissioners v. Rowe*, 5 Ap. Ca. 736.

(i) *Dean, &c., of Ely v. Bliss*, 4 D. M. G. 472. See also *Re Turner*, 11 L. Ch. R. 304; *Angell v. Angell*, 9 Q. B. 355; *Payet v. Foley*, 14 M. & W. 214.

(k) *Grant v. Ellis*, 9 M. & W. 113.

(l) *Archbold v. Scully*, 9 H. L. C. 360.

(m) *Saunders v. Lord Annesley*, 2 Sch. and Lef. 95.

(n) Pp. 13, 24 to 32, *post*.

(o) *Daly v. Lord Blomfield*, 5 I. L. R. 65.

(p) P. 10, *post*.

(q) See s. 34, *post*.

(r) *Scott v. Nixon*, 3 Dr. and War. 388-405.

(s) *Doyle v. Kaufman*, 3 Q. B. D. 7, 340. And see *Manby v. Manby*, 3 Ch. D. 101, p. 52, *post*.



3 & 4 Will.  
4, c. 27,  
§ 3.

WHEN TIME BEGINS TO RUN—GENERALLY.

When  
right ac-  
crued and  
time  
begins to  
run in  
certain  
cases.

**3.** And be it further enacted,<sup>1</sup> that in the construction of this Act the right to make an entry or distress or bring an action to recover any land or rent shall be deemed to have first accrued at such time as hereinafter is mentioned ; (that is to say,) when the person claiming such land or rent, or some person through whom he claims, shall, in respect of the estate or interest claimed, have been in possession or in receipt of the profits of such land, or in receipt of such rent, and shall while entitled thereto have been dispossessed, or have discontinued<sup>2</sup> such possession or receipt, then such right shall be deemed to have first accrued at the time of such dispossession or discontinuance of possession, or at the last time at which any such profits or rent were or was so received ; and when the person claiming such land or rent shall claim the estate or interest of some deceased person who shall have continued in such possession or receipt in respect of the same estate or interest until the time of his death, and shall have been the last person entitled to such estate or interest who shall have been in such possession or receipt, then such right shall be deemed to have first accrued at the time of such death ; and when the person claiming such land or rent shall claim in respect of an estate or interest in possession granted, appointed, or otherwise assured by any instrument (other than a will)<sup>3</sup> to him, or some person through whom he claims, by a person being in respect of the same estate or interest in the possession or receipt of the profits of the land, or in the receipt of the rent, and no person entitled under such instrument shall have been in such possession or receipt, then such right shall be deemed to have first accrued at the time at which the person claiming as aforesaid, or the person through whom he claims, became entitled to such possession or receipt by virtue of such instrument ; and when the estate or interest claimed shall have been an estate or interest in reversion or remainder, or other future estate or interest,<sup>4</sup> and no person shall have obtained the posses-

sion or receipt of the profits of such land or the receipt of such rent in respect of such estate or interest, then such right shall be deemed to have first accrued at the time at which such estate or interest became an estate or interest in possession; and when the person claiming such land or rent, or the person through whom he claims, shall have become entitled by reason of any forfeiture<sup>5</sup> or breach of condition, then such right shall be deemed to have first accrued when such forfeiture was incurred or such condition was broken.

3 & 4 Will.  
4, c. 27,  
§ 3.

<sup>1</sup> Sects. 2 and 3 changed the law with regard to what is considered adverse possession. "We are all clearly of opinion that the 2nd and 3rd sections," said LORD DENMAN (t), "have done away with the doctrine of non-adverse possession; and, except in cases falling within the 15th section of the Act, the question is whether twenty years (or, under the Act of 1874, twelve years) have elapsed since the right accrued, whatever be the nature of the possession" (u). Formerly a constructive permission or authority was implied in many cases; but it may now be laid down as a general rule (subject to certain qualifications which are mentioned below), that mere possession by any person other than the true owner is adverse, unless such person is in possession (a) by the express permission of the true owner, or (β) under a title which he believes to be lawful (x).

Non-ad-  
verse pos-  
session  
abolished.

Mere pos-  
session  
now  
usually  
adverse.

(a) The case of trustee and *cestui que trust* may be considered to come within the first of these exceptions; for the possession of a trustee is equivalent to that of his *cestui que trust* (y). As regards the receipt of rents by a constructive trustee, the then state of the law was observed upon by STUART, V.-C., in 1863, as follows:—"The fact of a person receiving the rents of a property raises a presumption that he receives them in the character of owner; but this presumption may be rebutted in many ways. It may be rebutted by express evidence to the contrary; by evidence affecting the person who has entered into possession; or by evidence of the mode in which he has dealt with the rents. In *Thomas v. Thomas* (p. 41, post), as I understand it, the V.-C. Wood had to consider the case of a father who had entered upon his infant son's land, and in that case he held that the father had entered

Excep-  
tions.  
Trustee  
and *cestui  
que trust*.  
Con-  
structive  
trustee.

(t) *Nepier v. Dn*, 2 M. & W. 911; 2 Sm. L. C., 8th ed., 584.

(u) See also *Culley v. Taylorson*, 11 A. & E. 1015.

(x) *Milner v. Brightwen*, 10 East, 583. See, however, *Palmer v. Eyre*, 17 Q. B. 366, and *Chadwick v. Broad-*

*wood*, 3 B. 308.

(y) *Garrard v. Tuck*, 8 C. B. 231; *Drummond v. Sant*, 1 L. R. 6 Q. B. 763. See, however, *Jacobs v. Phillips*, 10 Q. B. 130; Darb. & Bos. Lim. 268-9; Ban. Lim. 193-4, and notes to s. 25, post, p. 55.

3 & 4 Will. 4, c. 27, § 3. as guardian, though he, then, expressed an opinion that an infant could not, in all cases, treat a stranger as a bailiff for the purpose of avoiding the effect of the Statute of Limitation. But in the present case, when the person who entered was the uncle, the nearest male relative of the infant, and the executor named in her father's will, and where he employed the rents in keeping down the the interest on the mortgage, the case can hardly be considered as a case of an entry by a stranger. . . . Where possession is relied upon as a bar it ought to be a clear and absolute possession, with nothing equivocal" (z).

Solicitor and client. Therefore time will not run in favour of a solicitor who has paid off a mortgage belonging to his client. His possession is considered as that of his client (a). And the possession of an agent is the possession of his principal (b). Where a mortgagee out of possession has foreclosed, time runs in favour of the mortgagor in possession from the date of the judgment for foreclosure absolute, and not from the date of the mortgage (c).

Possession under colour of legal title. (β) Possession is not adverse if the claimant enters under colour of a legal title:—

Thus, a person who enters into possession as tenant for life, *e.g.* under a will, is not allowed afterwards to say that such possession was unlawful, so as to give his heir a right, by virtue of the statute, against the remainderman. *Per* MARTIN, B. (d).

It is clear also (e) that land of which a testator is wrongfully in possession passes by his will. But MALINS, V.-C., drew a distinction (f) between the above cases and cases where the testator did not *intend* to pass the land claimed. A widow entered into possession of all her husband's real estate as tenant for life under his will, and more than twenty years afterwards she found that part of the estate did not pass by the devise to her because it had been purchased after the date of the will, which was made before 1838. Thereupon she sold it to a purchaser for value, who set up the Statute of Limitation, and the remaindermen under the will were held to be barred. Inasmuch as the widow entered and held the property during the whole twenty years *under the belief that she was entitled to it as tenant for life under the will*, it is submitted with great deference, that this decision, although certainly consonant with the spirit of the Statutes of Limitation, is irreconcilable with the *dictum* cited above in *Anstee v. Nelms*.

(z) *Pelly v. Bascombe*, 4 Giff. 395.

(a) *Ward v. Carttar*, L. R. 1 Eq. 29.

(b) *Williams v. Pott*, L. R. 12 Eq. 149.

(c) *Heath v. Pugh*, 6 Q. B. D. 345; 7 Ap. Ca. 235.

(d) *Anstee v. Nelms*, 1 H. & N. 232;

see also *Board v. Board*, L. R. 9 Q. B. 48.

(e) *Hawksbee v. Hawksbee*, 11 H. 230, and *Asher v. Whitlock*, L. R. 1 Q. B. 1.

(f) *Paine v. Jones*, L. R. 18 Eq. 320.

The possession of a tenant, of the land subject to his tenancy, at first sight appears to come within both exceptions, (a) and (β). Accordingly, in respect of such land, the possession of the tenant is deemed the possession of his landlord so long as the tenancy exists. But after the expiration of the tenancy, time begins to run in his favour against his landlord; so that if he remains in possession for twenty (or, now, twelve) years after such expiration without payment of rent, the landlord's title will be barred (g). A corporation granted a lease as lord of a manor, and the lessee retained the court rolls and remained in possession of the lands after the lease expired. The corporation took no action for twenty-two years, and was then held to be barred (h).

3 & 4 Will.  
4, c. 27,  
§ 3.

Landlord  
and  
tenant.

<sup>2</sup> Mere discontinuance of possession is not sufficient to bring a case within the statute. There must be both absence of possession by the rightful owner, and actual possession by some other person (i). And such possession must be by the person wishing to assert the statute; and not by a third person, or by custody of the law. *Per* CHRISTIAN, L. J. (k). In the absence of concealed fraud (l) it is not necessary that the owner should be aware of the adverse possession (m). Mere acts of user by another person, consistent with the enjoyment by the rightful owner of the land for the purposes for which he intends to use it, do not amount to dispossession (n). "In deciding whether there has been a discontinuance of possession the nature of the property must be looked at" (o).

What pos-  
session  
sufficient  
to bar  
owner.

Accordingly, it was held that mere omission to work quarries, reserved to the lessor by a lease of the surface of the lands, was not a discontinuance of possession within this section. The original possession of the lessor remains unaltered in such a case (p). See also cases under s. 26 (q). And fifty years mere possession of a ditch on agricultural land was held not adverse (r). This decision was based on the fact that the site of the ditch had not been built upon or used otherwise than as agricultural land. It has, however, been dissented from by JAMES, L. J. (s); and in a recent case it was held that a good title was acquired against a Railway Company by an adjoining owner who had occupied and cultivated a strip of land 4ft. 6in. wide between his own land and a hedge which divided such strip from the other land of the Company (t).

(g) *Derry v. Oxenham*, 7 M. & W. 131; *Lansdell v. Gower*, 17 Q. B. 589; 11 Jur. 100. See also *Chadwick v. Broadwood*, 3 B. 308 (post, p. 31).

(h) *Dean and Chapter of Wells v. Daddington*, 2 Coll. 73.

(i) *Smith v. Lloyd*, 9 Ex. 562—572.

(k) *Howlin v. Shepherd*, 19 W. R. 235.

(l) See s. 26.

(m) *Rains v. Buxton*, 14 Ch. D. 537.

(n) *Leigh v. Jack*, 5 Ex. D. 264.

(o) *Per* COTTON, L. J., *Ibid.* 274.

(p) *M'Donnell v. M'Kinty*, 10 I. L. R. 514—526.

(q) P. 54, post.

(r) *Searby v. Tottenham Ry. Co.* L. R. 5 Eq. 409.

(s) 13 Ch. D. 271, n.

(t) *Norton v. L. & N. W. Ry. Co.*, 13 Ch. D. 268.

**3 & 4 Will.** Where a fence between adjoining owners consists of a hedge and ditch,  
**4, c. 27,** the ditch is presumed to belong to the owner of the land on the *opposite*  
**§ 3.** side of the fence (u).

As to adverse possession of a boundary wall, see *Phillipson v. Gibbon* (x). In this case the wall contained a stone bearing an inscription, which decided the ownership.

Where a gravel pit, which had been allotted to surveyors of highways, was filled up and ploughed over by the adjoining owner, it was held that time, thereupon, began to run against the surveyors (y).

And where A. demised land to B. for ever subject to a rent, reserving to himself a road to a well, and B. built a wall across the road, A.'s title was held to be barred in twenty years (z). The time would, now, be twelve years.

And, notwithstanding the doctrine that a tenant's possession is that of his landlord, if a tenant wrongfully occupies land belonging to his landlord, but not included in his lease, without payment of rent, for twenty (or now, twelve) years, the landlord will be barred by ss. 2 and 3 (a).

See *Keyse v. Powell* (b) as to possession of mines by a tenant to whom a moiety of the fee simple was conveyed during the tenancy.

**Copyholders.** Time will run against a copyholder from a seizure *quousque* by the  
**Rent.** lord of the manor (c). Rent in this section means "rent charge" only (d). The right to a quit-rent is barred in twelve years from the last payment (e). Land subject to a fee farm rent was sold, and the vendor continued to pay the rent for sixty years. It was held that there had been no discontinuance of receipt of the rent, and the owner was not barred (f).

As regards landlord and tenant, there is now a distinction between mere *non-receipt* of rent and *payment to a stranger* (g). This was not the case formerly (h).

**Royalties.** As to royalties reserved by a mining lease, see *Denys v. Shuckburgh* (i).  
 \* "Other than a will." As to these words, see *James v. Salter* (k).

**Future estates.** \* Time was held to run against the heir of a married woman whose husband had abandoned possession while entitled in right of his wife (l).

(u) Lord St. Leonard's Handy Book, 8th ed., p. 74.

(x) L. R. 6 Ch. 428-434, *post*, p. 38.

(y) *Smith v. Stocks*, 17 W. R. 1135.

(z) *Tottenham v. Byrne*, 12 L. C. L. R. 376.

(a) *Baddley v. Massey*, 17 Q. B. 373. Compare *Drummond v. Sant*, L. R. 6 Q. B. 763; *Dixon v. Baty*, L. R. 1 Ex. 259.

(b) 2 El. & Bl. 132.

(c) *Walter v. Webb*, L. R. 5 Ch. 531.

(d) *Angell v. Angell*, 9 Q. B. 355.

(e) *De Beauvoir v. Owen*, 5 Ex. 166.

(f) *Adnam v. Sandwich*, 2 Q. B. D. 485.

(g) 2 Sm. L. C., 6th ed., 643.

(h) *Hovenden v. Lord Annesley*, 2 Sch. & Lef. 624.

(i) 4 Y. & C. 42.

(k) 3 Bing. N. C. 554.

(l) *Corbyn v. Bramston*, 3 A. & E. 63.

But where a husband conveyed his wife's estate during coverture without a fine, time did not run against the wife's heir; the wife's interest being held a "future estate or interest" to take effect on the termination of the coverture (m). Similarly where copyholds were surrendered to the use of a husband and wife for life, and the heirs of the husband, the estate of the assignee in bankruptcy of the husband (who had absconded) was held to be a "future estate," to take effect on the death of the wife (n). The surrender and renewal of a lease do not make the estate of the lessor an estate in possession (o). And where a tenant in tail purported to dispose of the fee simple it was held that the right of his heir did not accrue till the death of the grantor (p). In the last case, and also in *Earl of Abergavenny v. Brace* (q), a distinction was drawn between an act which put it out of the power of a tenant in tail to enter (e.g., a conveyance), and a voluntary abandonment of possession, where the tenant in tail could enter at any time; and in the latter case, time was held to run against him and all future tenants in tail (r). As to an estate tail see also ss. 21—23 (s).

3 & 4 Will  
4, c. 27,  
§ 3.

Remainder  
after life  
estate.

Tenant in  
tail in re-  
mainder.

<sup>b</sup> See s. 4 (t).

## WHEN TIME BEGINS TO RUN—MORTGAGES.

The following short supplementary Act was passed to remove doubts which arose under s. 3 of 3 & 4 Will 4, c. 27:—

7 Will. 4  
& 1 Vict.  
c. 28.

[Whereas doubts have been entertained<sup>1</sup> as to the effect of a certain Act of Parliament made in the 3rd and 4th years of his late Majesty King William 4, intituled "*An Act for the Limitation of Actions and Suits relating to real Property, and for simplifying the remedies for trying the rights thereto*," so far as the same relates to mortgages; and it is expedient that such doubts should be removed. Be it declared and enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal and Commons, in this present Parliament assembled, and by the authority of the same,

Doubts  
arose as to  
construc-  
tion of  
3 & 4 Will.  
4, c. 27,  
with re-  
gard to  
mortgages.

(m) *Jumpeen v. Pitchers*, 13 Sim. 327—332.

(n) *Johnson v. Liversedge*, 11 M. & W. 517—525.

(o) *Corpus Christi College v. Rogers*, 49 L. J. 4.

(p) *Rimington v. Cannon*, 12 C. B.

18—33.

(q) L. R. 7 Ex. 145.

(r) *Earl of Abergavenny v. Brace*, L. R. 7 Ex. 145. See, however, *Williams v. Pott*, L. R. 12 Eq. 147.

(s) *Post*, pp. 47-49.

(t) *Post*, pp. 18, 19.

7 Will. 4  
& 1 Vict.  
c. 23.

Mortgagees may bring actions within twenty years after last payment of interest.

that it shall and may be lawful<sup>2</sup> for any person entitled to or claiming under any mortgage<sup>3</sup> of land, being land within the definition contained in the first section of the said Act, to make an entry or bring an action at law or suit in equity to recover such land at any time within twenty years<sup>4</sup> next after the last payment of any part of the principal money or interest<sup>5</sup> secured by such mortgage, although more than twenty years have elapsed since the time at which the right to make such entry or bring such action or suit in equity shall have first accrued, anything in the said Act notwithstanding.]

<sup>1</sup> The "doubts" here referred to were expressed by PATERSON, J., as follows:—"How far under the 3rd section it is necessary for the mortgagee to bring his action within twenty years from the day of default I cannot say: I do not see my way at all. If the 3rd section was intended to comprehend the case of a mortgage, it is very ill penned; and the 40th section, if meant to apply to actions of ejectment, is still worse penned" (u).

Mortgagees have same rights as before 3 & 4 Will. 4, c. 27. Even against persons who have acquired title against mortgagor.

<sup>2</sup> This Act preserves to a mortgagee the same rights as if 3 & 4 Will. 4, c. 27, had not been passed, and he may, in some cases, maintain an action against a person who has acquired title by possession so far as the mortgagor is concerned.

In 1821 A. let his sister B. into possession of a house; and she remained there without payment of rent or acknowledgment of her brother's title for thirty years. In 1823 A. mortgaged the property to X., and paid interest as late as 1841. It was held that such payment by A. gave X. twenty years from 1841 within which to bring an action against B., although A.'s title was barred (x).

And where the mortgagor let his son into possession and allowed him to acquire title against him, POLLOCK, C. B., said: "No authority is wanted to show that the mortgagee to whom interest has been paid within twenty years has a title against any person claiming under the mortgagor" (y).

But if a person is holding adversely to the mortgagor at the date of the mortgage, and continues so to hold, it has been considered that he

(u) *Jones v. Williams*, 5 A. & E. 297. Compare *Du Vigier v. Lee*, 2 H. 326—332; *Palmer v. Eyre*, 17 Q. B. 366.

(x) *Palmer v. Eyre*, 17 Q. B. 366.

(y) *Ford v. Ager*, 11 W. R. 1073—4.



may acquire title also against the mortgagee (z). This opinion, however, appears to be inconsistent with the decision in *Palmer v. Eyre* (a). 7 Will. 4  
& 1 Vict.  
c. 28.

When a mortgagee, out of possession, has obtained judgment for foreclosure absolute, time runs against him from the judgment (b).

<sup>3</sup> A purchaser from mortgagor and mortgagee, the mortgage being paid off, is a person "claiming under" the mortgage; and has the mortgagee's rights as against third persons who may have acquired rights against the mortgagor. Time runs against him from the payment off of the mortgage (c). Purchaser  
from  
mortgagor  
and mort-  
gagee.

"A mortgagor cannot, by putting the equity of redemption in settlement, affect the rights of the mortgagee against the mortgaged property. He cannot, by carving out derivative interests in the equity of redemption, create any rights which he had not himself. No doubt the tenant for life is the party bound to pay the interest; but still, mere laches or neglect to demand the interest from the tenant for life will not prejudice the claim of the mortgagee against those in remainder. This was decided by *Loftus v. Swift* (d), in this Court before Lord Redesdale, and is the settled rule of this Court." *Per* LORD ST. LEONARDS, when L. C. of Ireland (e). Persons  
claiming  
under  
settlement  
of equity  
of redemp-  
tion.

<sup>4</sup> This period is now reduced to twelve years by the Act of 1874 (f).

<sup>5</sup> An admission by a tenant for life of the equity of redemption, that interest has been paid within twenty years, does not prevent the statute from running in favour of the remainderman when no actual payment is proved (g). Admis-  
sions by  
persons  
claiming  
through  
mortgagor.

Payment of rent to the mortgagee by a tenant in pursuance of a notice to that effect does not keep alive his right. The payment must be by the mortgagor or by some person bound to pay principal or interest on his behalf (h).

Estates in three different counties were comprised in one mortgage, and a receiver of the rents of one of such estates was appointed by the Court, at the instance of the mortgagee. The mortgagor sold the other two estates; but it was held that only the equity of redemption passed, and that the payment of interest by the receiver preserved the mortgagee's rights as to all three estates (i).

(z) *Eyre v. Wa'ah*, 10 I. C. L. R. 192—202.  
346—353.

(a) 17 Q. B. 366.

(b) *Heath v. Pugh*, 6 Q. B. D. 345;  
7 Ap. Ca. 235.

(c) *Baddley v. Massey*, 17 Q. B. 373.

(d) 2 Sch. & Lef. 642.

(e) *Wrixon v. Vize*, 2 Dr. & War.

(f) See s. 6, *post*, p. 30.

(g) *Gregson v. Hindley*, 10 Jur.

383.

(h) *Harlock v. Ashberry*, 19 Ch. D.

539.

(i) *Chinnery v. Evans*, 11 H. L. C.

115.



## FORFEITURE—REVERSIONERS.

3 & 4 Will.  
4, c. 27,  
§ 4.

Rever-  
sioner need  
not take  
advantage  
of a for-  
feiture.

4. Provided always, that when any right to make an entry or distress or to bring an action to recover any land or rent, by reason of any forfeiture<sup>1</sup> or breach of condition,<sup>2</sup> shall have first accrued in respect of any estate or interest in reversion or remainder, and the land or rent shall not have been recovered by virtue of such right, the right to make an entry or distress or bring an action to recover such land or rent shall be deemed to have first accrued in respect of such estate or interest at the time when the same shall have become an estate or interest in possession, as if no such forfeiture or breach of condition had happened.<sup>3</sup>

<sup>1</sup> This section is declaratory of the rule that no one need take advantage of a forfeiture. A condition that in certain events a mining license should be void was held to mean voidable at the option of the lessor; and such option would not be presumed in the absence of any act showing an intention to determine the term for which the license was granted (*k*).

Power of  
re-entry is  
optional.

A similar decision was given in respect of a proviso that, upon breach of covenant, a lease should be "wholly void," coupled with a power of re-entry (*l*). To hold otherwise would be contrary to the universal principle that a person shall never take advantage of his own wrong. *Per* LORD ELLENBOROUGH (*m*). The same principle was laid down and acted upon in a case (*n*) where a contract was held void, at the option of the vendor only, on the default of the purchaser in payment of certain auction duty, which he was bound to pay. Compare the *ratio decidendi* in *Thomas v. Brown* (*o*).

In another case, a provision similar to that in *Arnsby v. Woodward* was held voidable only; and an opinion was expressed by PARKE, B., that an absolute unqualified demand of rent, by a person having sufficient authority, would (like the actual receipt of rent) have amounted to a waiver of the forfeiture (*p*).

(*k*) *Roberts v. Davey*, 4 B. & Ad. 664.

(*l*) *Arnsby v. Woodward*, 6 C. B. 579.

(*m*) *Rede v. Farr*, 6 M. & S. 124.

(*n*) *Malins v. Freeman*, 4 Bing. N. C. 395.

(*o*) 1 Q. B. D. 714.

(*p*) *Nash v. Birch*, 1 M. & W. 402. See also *Hyde v. Watts*, 12 M. & W. 254—268; and *Flower v. Peck*, 1 B. & Ad. 428; *Hughes v. Palmer*, 19 C. B. (N. S.) 393; *Gregson v. Harrison*, 2 T. R. 425—431.

<sup>2</sup> This section applies to limitations on breach of condition as well as to other cases of forfeiture, and ought to be read in its widest sense. Where a tenant in tail, who had incurred a forfeiture by not assuming the name and arms of the testator within a given time, remained in possession for more than twenty years, the remainderman was not barred under this section and s. 3; but his right was held to accrue on the death of such tenant in tail (q).

3 & 4 Will.  
4, c. 27,  
§ 4.

Limita-  
tions over  
on breach  
of con-  
dition.

In the same case a question also arose whether breach of a condition in a will, of which the person thereby affected had no notice, amounted to a forfeiture. It had been previously held that the *heir-at-law* of a testator could not be defeated by such a condition, unless he had notice (r), and that the burden of proving notice was on the person setting up the breach (s).

Name and  
arms  
clause.

But, as regards legatees or devisees, even when such devisees are tenants in tail, the rule is different; and they are bound by a condition in the will under which they take, though they may have been abroad and have never heard of the condition (t).

<sup>3</sup> See also notes to s. 5, *post*.

## WHEN TIME RUNS—FUTURE ESTATES.

5.<sup>1</sup> *Provided also, that a right to make an entry or distress, or to bring an action to recover any land or rent, shall be deemed to have first accrued, in respect of an estate or interest in reversion,<sup>2</sup> at the time at which the same shall have become an estate or interest in possession<sup>4</sup> by the determination of any estate or estates in respect of which such land shall have been held, or the profits thereof or such rent shall have been received, notwithstanding the person claiming such land,<sup>3</sup> or some person through whom he claims, shall at any time previously to the creation of the estate or estates which shall have determined, have been in possession or receipt of the profits of such land, or in receipt of such rent.<sup>4</sup>*

3 & 4 Will.  
4, c. 27,  
§ 5.

Previous  
possession  
of rever-  
sioner not  
to affect  
his right of  
entry on  
his rever-  
sion  
becoming  
an estate  
in posses-  
sion.

(q) *Astley v. Earl of Essex*, L. R. 18 Eq. 290.

(r) *Kenrick v. Lord Beaucherc*, 11 East. 657.

(s) *Taylor v. Crisp*, 8 Ad. & El. 788—9.

(t) *Porter v. Fry*, 1 Vent. 199; *Re Hodges' Legacy*, L. R. 16 Eq. 92; *Astley v. Earl of Essex*, L. R. 18 Eq. 290; *Powell v. Raule*, L. R. 18 Eq. 243.

3 & 4 Will. 1 This section is repealed, and s. 2 of the Act of 1874 takes its place  
4, c. 27, as from the 1st of January, 1879.

**§ 5.**

The liberal proviso contained in this and the first clause of the new section is considerably curtailed by s. 20 of the Act of 1833, which see (*post*, p. 45). See also notes 5 and 6, *post*, pp. 21 and 22.

Sect. 2 of the Act of 1874 is as follows:—

37 & 38  
Vict. c 57,  
**§ 2.**

Provided  
the person  
entitled to  
the inter-  
vening  
estate  
shall have  
been in  
possession  
when his  
interest  
deter-  
mined.

[2. A right to make an entry or distress, or to bring an action<sup>1</sup> or suit, to recover any land or rent, shall be deemed to have first accrued, in respect of an estate or interest in reversion<sup>2</sup> or remainder, or other future estate or interest, at the time at which the same shall have become an estate or interest in possession,<sup>4</sup> by the determination of any estate or estates in respect of which such land shall have been held, or the profits thereof or such rent shall have been received, notwithstanding the person claiming such land<sup>3</sup> or rent, or some person through whom he claims, shall at any time previously to the creation of the estate or estates which shall have determined, have been in the possession or receipt of the profits of such land, or in receipt of such rent:<sup>5</sup> But if the person last entitled to any particular estate on which any future estate or interest was expectant shall not have been in the possession or receipt of the profits of such land, or in receipt of such rent, at the time when his interest determined, no such entry or distress shall be made, and no such action or suit shall be brought, by any person becoming entitled in possession to a future estate or interest, but within twelve years next after the time when the right to make an entry or distress, or to bring an action or suit, for the recovery of such land or rent, shall have first accrued to the person whose interest shall have so determined, or within six years next after the time when the estate of the person becoming entitled in possession shall have become vested in possession, whichever of those two periods shall be the longer;<sup>6</sup> and if the right of any such person<sup>7</sup> to make such entry or distress, or to bring any such action or suit, shall have

been barred under this Act, no person afterwards claiming<sup>8</sup> to be entitled to the same land or rent in respect of any subsequent estate or interest under any deed, will, or settlement, executed or taking effect after the time when a right to make an entry or distress, or to bring an action or suit, for the recovery of such land or rent, shall have first accrued to the owner of the particular estate whose interest shall have so determined as aforesaid, shall make any such entry or distress, or bring any such action or suit, to recover such land or rent.]

3 & 4 Will.  
4. c. 27,  
§ 5.  
37 & 38  
Virt. c. 57,  
§ 2.

It will be noticed that the first paragraph of the new section merely amends its predecessor in three particulars:—

<sup>1</sup> As in s. 1 of the Act of 1874, the words “or suit” are inserted after “Or suit.” action.

<sup>2</sup> The words “or remainder or other future estate or interest” have also been added in the new section after “reversion.” This alteration brings it into conformity with s. 3 of the Act of 1833. “Or remainder.”

<sup>3</sup> And the words “or rent,” which appear to have been omitted by mistake from s. 5 of the Act of 1833, are inserted in the s. 2 of the Act of 1874. “Or rent.”

<sup>4</sup> The surrender and renewal of a lease do not make the estate of the lessor an estate or interest in possession (u).

The joint effect of ss. 3, 5, and 20 of the Act of 1833 seems to have been that when the same person was entitled to a particular estate (e.g., for life), and also to the reversion, or a remainder, or other future estate in the same land or rent-charge, and had allowed his particular estate to become barred under s. 2 of that Act, no new right accrued to him, unless in the meantime the land or rent-charge had been held or received by some person entitled to an intermediate estate between such particular estate and such reversion or remainder. Therefore where his reversion or remainder was immediately expectant upon his own particular estate, time ran continuously against him; and if one estate was barred, he had also lost all right to make any claim in respect to the other (x).

Effect of  
§§ 3, 5, and  
20 of 3 &  
4 Will. 4,  
c. 27.

<sup>5</sup> The effect of ss. 3 and 20 of the Act of 1833, and the first clause of s. 2 of the Act of 1874, will be similar.

But if the land or rent had been held or received by some other person in respect of an intermediate estate, the reversioner or remainder-

(u) *Corpus Christi College v. Rogers*, 49 L. J. 4.

(x) See *Hall v. Mouldsley*, 16 M. & W. 689.

3 & 4 Will. 4, c. 27, § 5. 37 & 38 Vict. c. 57, § 2.

man had a new right of entry which he could have exercised at any time within twenty years after the termination of such intermediate estate. This right, however, is materially curtailed by the latter portion of the new section. Formerly, it would probably have been enough if the person entitled to the intermediate estate had *been* in possession or receipt, no matter for how short a time. Henceforth, he must have *continued* in possession or receipt till the end of his estate or interest, or the reversioner will only have the periods mentioned in note 6, *post*, to bring an action.

Effect of  
new enact-  
ment.

It may here be remarked that a reversion expectant on a trust term is not within these sections (y), unless actual possession be taken by the trustee of the term, or some person claiming under him (z). The appointment of a receiver in a suit to enforce the trusts of a term is a sufficient possession (a).

\* The second clause of s. 2 of the Act of 1874 makes an important alteration in the law. Hitherto, as we have seen, a reversioner or remainderman, with the exception of the comparatively rare case in which his reversion or remainder was immediately expectant upon a prior particular estate of his own, which he had allowed to become barred, had always twenty years from the time when his reversion or remainder came into possession in the natural order of events, within which he might enter or bring an action, no matter how many owners of prior particular estates in the same land or rent-charge might have allowed their rights to slumber while an adverse claimant possessed the land or received the rent.

Under the Act of 1874, however, a reversioner or remainderman must assert his rights within twelve years after the termination of the prior estate, even if the owner of such prior estate remains in possession or receipt till such termination. If, on the other hand, such prior owner happens to be dispossessed (under circumstances which do not amount to a forfeiture) before the natural termination of his estate, the reversioner or remainderman must bring his action or make his entry either (a) within twelve years after such dispossession or (β) within six years after the natural termination of the prior estate and the consequent accrual of his own right as reversioner to possession. It is presumed, however, that if the prior owner incurs a forfeiture (of which the reversioner or remainderman does not take advantage) and remains in possession or receipt until the natural termination of his estate, the reversioner or remainderman will still, by virtue of s. 4 of the Act of 1833, have twelve years within which to assert his rights.

Compare the provision, as regards landlord and tenant, of s. 9 (b).

- |  |   |
|--|---|
| (y) <i>Humble v. Humble</i> , 24 B. 535.   | (a) <i>Re Bermingham's Estate</i> , I. R. 5 |
| (z) <i>Twaddle v. Murphy</i> , 8 L. R. Ir. | Eq. 147—158.                                |
| 123.                                       | (b) <i>Post</i> , p. 30.                    |

<sup>7</sup> The third clause of the new section is obscurely worded. The words "any such person" probably refer to the reversioner or remainderman whose rights are affected by the previous clauses of the section, and not to the owner of the prior estate.

3 & 4 Will.  
4, c. 27,  
§ 5.  
37 & 38  
Vict. c. 57,  
§ 2.

\* Whether the words "no person afterwards claiming" are confined to a person claiming through such reversioner or remainderman, is a question which the Court will probably be called upon to decide. Such would certainly be the more reasonable construction; but the intention of the legislature might have been more clearly expressed.

"Any such person."  
"No person afterwards claiming."

## WHEN TIME RUNS—ADMINISTRATOR.

6. And be it further enacted, that for the purposes of this Act an administrator<sup>1</sup> claiming the estate or interest of the deceased person of whose chattels he shall be appointed administrator shall be deemed to claim as if there had been no interval of time<sup>2</sup> between the death of such deceased person and the grant of the letters of administration.<sup>3</sup>

3 & 4 Will.  
4, c. 27,  
§ 6.

Time runs continuously against administrator as it would have done against his intestate.

<sup>1</sup> The property of a testator vests in his executor from the time of his death; that of an intestate in his administrator, from the date of the grant of letters of administration. The former derives his title from the will, the latter from the Court (c).

<sup>2</sup> But the title of an administrator, when vested, relates back to the time of death, so that he can maintain an action, the cause of which arose after the death, but before the grant (d).

But such relation back does not extend to authorise any acts which prejudice the intestate's estate, but only enables the administrator to do acts for the benefit of the estate (e).

Title of administrator relates back in certain cases.

<sup>3</sup> This section was probably suggested by a decision under a former statute, to the effect that where a cause of action occurred to an intestate's estate after his death but before administration, time did not begin to run until the grant, on the ground that there was previously no person in existence capable of suing (f).

Reason for this enactment.

(c) *Woolley v. Clark*, 5 B. & Ad. 744.

(d) *Tharpe v. Stallwood*, 5 Man. & Gr. 760; *Poster v. Bates*, 12 M. & W. 226; *Welchman v. Sturgis*, 13 Q. B. 552.

(e) *Morgan v. Thomas*, 8 Ex. 307; see also *Williams on Executors*, 7th ed., pp. 638—642.

(f) *Murray v. E. I. Co.*, 5 B. & Al. 214—5; see also *Pratt v. Swaine*, 8 B. & C. 287.

## WHEN TIME RUNS—TENANCY AT WILL.

3 & 4 Will  
4, c. 27,  
§ 7.

Tenancy  
at will.  
When  
right  
accrues.

7. And be it further enacted, that when any person shall be in possession or in receipt of the profits of any land or in receipt of any rent,<sup>1</sup> as tenant at will, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or distress or bring an action to recover such land or rent, shall be deemed to have first accrued, either at the determination of such tenancy or at the expiration of one year next after the commencement of such tenancy, at which time such tenancy shall be deemed to have determined:<sup>2</sup> Provided always, that no mortgagor<sup>3</sup> or *cestui que trust* shall be deemed to be a tenant at will, within the meaning of this clause, to his mortgagee or trustee.

Tenancy  
at will.  
Not retro-  
spective.

This section is not retrospective, so as to include a case where the tenancy at will determined before the passing of the Act. In such a case time runs from the period when the tenancy at will would have determined if the Act had not been passed (*g*).

Meaning  
of "rent."

<sup>1</sup> "A tenant at will of *land* out of which a rent is *reserved* cannot, by any possible construction of language, be said to be in *receipt* of the *rent* which he pays. . . . The word *rent*, therefore, in the 7th section must mean *rent-charge*; and there is no absolute absurdity in supposing that a person seised in fee, or for life, of a rent-charge might, for a gross sum of money, demise it for years, or at will, at a smaller rent." *Per LORD DENMAN*, C. J. (*h*).

Time runs  
from one  
year after  
com-  
mence-  
ment of  
tenancy  
at will,  
although  
*actual* de-  
termina-  
tion may  
be much  
later,  
unless new  
tenancy  
at will is  
created.

<sup>2</sup> By this section the determination of a tenancy at will is thrown back to one year from its commencement. A tenancy at will by a son and the son's widow for twenty-one years was held a bar to the father's estate (*i*).

Where a tenant at will who entered in 1817 had been in possession ten years the owner entered, and cut and carried away stone without the consent of the tenant. Held that this determined the tenancy at will, but that the owner's right of action was by this section thrown back to 1818, unless a new tenancy at will was created. A tenancy by sufferance would be presumed after 1827 (*k*).

(*g*) *Evans v. Page*, 5 Q. B. 767—771.

(*h*) *Angell v. Angell*, 9 Q. B. 356.

(*i*) *Goody v. Carter*, 9 Q. B. 863, 867.

(*k*) *Bennett v. Turner*, 7 M. & W. 226.



On appeal, in the same case, an assessment of land tax signed by the 3 & 4 Will tenant (who was also assessor), in which he was named as occupier 4, c. 27, and the owner as proprietor, was held to be evidence of a new tenancy § 7. at will (l).

The above cases were disapproved of by LORD CAMPBELL (m), who Opinion said:—"It is difficult to contend that, universally, every tenancy at of Lord will shall be deemed to have expired by operation of law at the expiration Campbell of one year after its commencement; and the more reasonable construction on this to put upon the enactment might have been that, *where there has been no actual determination* of the tenancy by the act of the parties *within twenty-one years*, it shall be deemed to have determined at the expiration of the first year, making an occupation without payment of rent for twenty-one years a bar; but where there has been an *actual determination* of the tenancy within that period, whereby a new right of entry accrues, this clause of the statute shall have no operation, such tenancy being supposed by the statute to continue till the right of entry is barred." His Lordship held that the eviction of a tenant within twenty years from the commencement of the tenancy gave the owners a new right of entry, although the tenant immediately afterwards re-entered; and that it was immaterial whether he was subsequently a tenant at will or a tenant at sufferance. It must be remarked, however, that in this case the tenancy at will commenced before the passing of the Act, and therefore came within the rule laid down in *Evans v. Page* (n). But it was decided on the ground that the owners actually recovered possession within the twenty years.

And in spite of the opinion expressed by Lord Campbell, it must now be considered settled that the rule laid down in the earlier cases is correct. In a more recent case before the Privy Council (o), Sir JOSEPH NAPIER said:—"The reasonable construction of the provision is, that the right shall accrue ultimately at the end of a year from the commencement of the tenancy at will, though it *may accrue sooner* by the *actual determination* of the term." In that case, a son who had been in possession, and dealt with the property as owner more than twenty-one years, was held to have acquired a title under this section.

*Semble*, however, that any entry or assertion of ownership by the proprietor will stop time from running under this section, because it terminates the existing tenancy at will and creates another; and time accordingly runs from the end of a year after such entry or assertion (p).

In cases under this section, therefore, the material question is, often,

(l) *Turner v. Bennett*, 9 M. & W. 643.

(m) *Randall v. Stevens*, 2 E. & Bl. 650-1.

(n) 5 Q. B. 767.

(o) *Day v. Day*, L. R. 3 P. C. 760.

(p) *Allen v. England*, 3 F. & F. 49.



3 & 4 Will. whether or not a new tenancy at will has been created by the acts of  
 4, c. 27, the parties, and it becomes necessary to consider how a tenancy at will  
 § 7. may be created or determined :

Cases on  
 creation of  
 tenancy  
 at will.

“ A simple permission to occupy creates a tenancy at will, unless there are circumstances to show an intention to create a tenancy from year to year ; as, for instance, an agreement to pay rent by the quarter, or some other aliquot part of the year.” *Per PARKE, B. (q).*

Payment of rent quarterly or half-yearly raises a presumption of a tenancy from year to year (*r*). Such a presumption may, however, be rebutted by evidence of a contrary intention (*s*).

As to the effect of taking possession under an agreement for purchase or lease (*t*), and as to the various circumstances which have been held to constitute a tenancy at will (*u*), it is sufficient to refer the reader to the cases. The guardians of the poor were allowed to occupy offices belonging to the Corporation of Brighton from 1855 to 1879 without payment of rent. In 1863 the Corporation asked for an acknowledgment in writing of their title, but the guardians refused to give it. The Court of Appeal held that the title of the Corporation was barred (*x*). An encroachment by a lessee, with the lessor's assent, on adjoining land belonging to the lessor, does not create a tenancy at will under this section. In such a case time does not run until the end of the lease (*y*), and the same rule applies to copyholds (*z*).

Cases on  
 termina-  
 tion of  
 tenancy  
 at will.

A feoffment, followed by livery of seisin, was held to terminate a tenancy at will, even though the tenant was ignorant of it (*a*). A notice that unless the tenant at will pays what is due to the owner, the latter will take immediate steps to recover the property, terminates the tenancy (*b*). An existing tenancy at will may be terminated and a new one constituted by agreement (*c*).

“ Anything which amounts to a demand of possession, although not expressed in precise and formal language, is sufficient to indicate the determination of the landlord's will.” *Per TINDAL, C. J. (d).*

(*q*) *Hall v. Wood*, 14 M. & W. 687. See also *Ri hardson & Langridge*, 4 Taunt. 128.

(*r*) *Braythwayte v. Hitchcock*, 18 M. & W. 494—497 ; *Cox v. Bent*, 5 Bing. 185.

(*s*) *Bastow v. Cor*, 11 Q. B. 122 ; *Dixie v. Davies*, 7 Ex. 89 ; *Lord v. Crago*, 6 C. B. 90—98.

(*t*) *Kirtland v. Pounsett*, 2 Taunt. 145 ; *Hegan v. Johnson*, 2 Taunt 148 ; *Right d. Lewis v. Beard*, 13 East. 216 ; *Newby v. Jackson*, 1 B. & C. 448 ; *Forrest & Chamberlaine*, 5 M. & W. 14.

(*u*) *Groves v. Groves*, 10 Q. B. 486 ;

*Souster v. Pinhorn*, 8 Ex. 763 ; *Lcy v. Peter*, 3 H. & N. 101 ; *Simpkin v. Ashurst*, 1 Cr. M. & R. 261 ; *Hodgson v. Hooper*, 11 Jur. N. S. 911—916.

(*x*) *Brighton v. Brighton*, 5 C. P. D. 368.

(*y*) *Whitmore v. Humphries*, L. R. 7 C. P. 1.

(*z*) *Attorney-General v. Tomline*, 5 Ch. D. 750.

(*a*) *Ball v. Cullimore*, 2 Cr. M. & R. 120.

(*b*) *Price v. Price*, 9 Bing. 356.

(*c*) *Locke v. Matthews*, 13 C. B. N. S. 753.

(*d*) *Price v. Price*, 9 Bing. 356.

*Semble* that an agreement for sale would terminate the tenancy (e). See also as to what circumstances will operate as a determination, the cases cited below (f). The tenancy may be determined at any time (g). 3 & 4 Will.  
4, c. 27,  
§ 7.

<sup>1</sup> A mortgagor in possession is tenant to the mortgagee (h); but he is not a tenant at will (i), although he may become such by express stipulation (k). He is more in the position of a receiver, though he is not strictly that. His possession is that of the mortgagee (l). He may therefore be described as a tenant at sufferance (m). Relation  
between  
mortgagor  
and  
mortgagee  
is not  
tenancy at  
will.

Even where a tenancy was expressly created, and a rent reserved by the mortgage deed, with a proviso that the mortgagee's right of eviction after default should not be affected, it was held that the mortgagor could be summarily ejected after default (n).

A mortgagor in possession may now sue in his own name, if the mortgagee has given no notice of his intention to take possession or enter into receipt of the rents and profits (o).

Subject to the provisions of s. 18 of the C. A., 1881, a tenant of a mortgagor, whose tenancy commences after the mortgage, is in no better position than his landlord. A tenant from year to year is, therefore, as respects the mortgagee, merely a tenant at sufferance, and may be ejected without notice, unless the mortgagor has an express or statutory power of leasing (p). Tenant of  
mortgagor.

## WHEN TIME RUNS—TENANCY FROM YEAR TO YEAR.

8. And be it further enacted,<sup>1</sup> that when any person shall be in possession<sup>2</sup> or in receipt of the profits of any land, or in receipt of any rent,<sup>3</sup> as tenant from year to year<sup>5</sup> or other period, without any lease in writing,<sup>4</sup> the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or distress or to bring an action to 3 & 4 Will.  
4, c. 27,  
§ 8.  
Tenancy  
from year  
to year.  
When  
right  
accrues.

(e) *Daniels v. Davi*, 16 Ves. 252.

(f) *Hogan v. Hand*, 14 M. P. C. C., 9 W. R. 673; *Souster v. Pinkhorn*, 8 Ex. 763; *Davies v. Thomas*, 6 Ex. 845; *Melling v. Leak*, 16 C. B. 652—669; *Clayton v. Blakey*, 2 Sm. L. C., 8th ed., 106—117, and cases there cited.

(g) *Peacock v. Peacock*, 16 Ves. 57.

(h) *Partridge v. Beere*, 5 B. & Al. 604; *Higginbotham v. Walton*, 4 M. & W. 415.

(i) *Thorp v. Facey*, 35 L. J. (C. P.) 349.

(k) *Dixie v. Davies*, 7 Ex. 89.

(l) *Birch v. Wright*, 1 T. R. 378.

(m) *Roby v. Maisy*, 8 B. & C. 767.

(n) *Garrod v. Olley*, 12 Ad. & El. 481. See also *Snell v. Tom*, 4 Q. B. 615.

(o) Jud. Act, 1873 (36 & 37 Vict. c. 66), s. 25 (5); *Fairclough v. Marshall*, 4 Ex. D. 37.

(p) *Thunder v. Belcher*, 3 East. 449—451; *Lows v. Telford*, 1 Ap. Cas. 414—426. See also *Keech v. Hall*, 1 Sm. L. C., 7th ed., 579—597; and *Moss v. Gallimore*, 1 Sm. L. C., 7th ed., 629—643; 8th ed., 627—641.

3 & 4 Will. 4, c. 27,  
§ 8. recover such land or rent shall be deemed to have first accrued at the determination of the first of such years or other periods, or at the last time when any rent<sup>3</sup> payable in respect of such tenancy shall have been received<sup>6</sup> (which shall last happen).

Retrospec-  
 tive.

<sup>1</sup> This section is retrospective to this extent: that it applies to a tenancy from year to year, which existed *before and at the time of* the passing of the Act; and in respect of which rent has since been paid (*q*). In the case deciding this, *Evans v. Page* (decided under s. 7) was referred to and distinguished.

Landlord  
 and  
 tenant.

<sup>2</sup> This section applies as between landlord and tenant as well as between owner and a third person (*r*).

Meaning  
 of "rent."

<sup>3</sup> In the first part of this section the word rent means *rent charge*, or *rent of inheritance*; in the latter part *rent reserved* (*s*).

"Lease in  
 writing."

<sup>4</sup> The case of a lease in writing is provided for by s. 9 (*t*).

Where the only evidence of tenancy was a memorandum in a parish book to the effect that the churchwardens and overseers agreed to let a cottage to the defendant at 1s. 6d. per week, and that the defendant agreed to quit at a month's notice, it was held that such memorandum (which was signed by the defendant and two of the overseers, but not by either of the churchwardens) was not a "lease in writing" within the meaning of this section, and that the lessors were barred by twenty-five years' possession without payment of rent (*u*).

Distinc-  
 tion be-  
 tween § 7  
 and § 8 as  
 regards  
 accrual of  
 right.

<sup>5</sup> A tenancy from year to year differs materially from a tenancy at will as regards the period from which time runs in favour of the tenant. In the case of a tenancy at will, it has been already stated that time runs from the end of the first year of the tenancy, or from the actual determination (whichever shall *first* happen). In the case of a tenancy from year to year, time runs from the end of the first year, or from the last payment of rent (whichever shall *last* happen).

Cases  
 under this  
 section.

The *legal* effect of payment of rent, after the expiration of a renewable lease, is (or was before the Judicature Acts) to create a tenancy from year to year. But, in equity, the tenant has a right to the renewal of the lease, which right will now be recognised in any division of the High Court. In such a case, if all the parties continue to act according to the terms of the original expired lease, the Court will consider the

(*q*) *Jukes v. Sumner*, 14 M. & W. 39—41.

(*r*) *Baines v. Lumley*, 16 W. R. 674;  
*Lansdell v. Gower*, 17 Q. B. 589; 16  
 Jur. 100.

(*s*) *Angell v. Angell*, 9 Q. B. 356.

(*t*) *Post*, p. 30.

(*u*) *Lansdell v. Gower*, 17 Q. B. 589;  
 16 Jur. 100.

tenancy to be one under a renewed lease, and not a tenancy from year to year, and consequently this section will not apply (x). 3 & 4 Will.  
4, c. 27,  
§ 8.

Where X. had declared, within twenty years of action brought, that he was paying rent to the owner, and it was proved that the person in possession had declared himself to be tenant to X., it was held that the owner was not barred (y).

See and compare *Re Alison* (z), *Sanders v. Sanders* (a), and *Bunting v. Sargent* (b).

A tenant from year to year paid rent up to May 1846. The landlord died in December 1846, and his representative brought ejectment in October 1866. Held that he was barred, as the case was within this section, and more than twenty years had elapsed since the last payment. To make the right accrue under s. 3, at the time of the lessor's death, the plaintiff must have proved payment of rent in November 1846 (c). Last pay-  
ment of  
rent.

It has already been observed that payment of rent for any aliquot proportion of a year raises a presumption of a tenancy from year to year. And in *Pope v. Garland* (d), ALDERSON, B., said, "A tenant at will at a yearly rent is a tenant from year to year."

Where the tenancy is disputed there ought to be strict proof that any payments by the alleged tenant were *in respect of rent* (e).

As to how a tenancy from year to year may be created, and when it will be presumed, see cases cited under s. 7 (f). Creation  
of tenancy  
from year  
to year.

As to the effect of raising the rent of a tenant from year to year as constituting a new tenancy on the old terms, see *Monck v. Geikie* (g).

A tenancy from year to year may be determined in various ways, as to which the reader is referred to the cases mentioned below (h), and, where lands and buildings were held (as is often the case in agricultural tenancies) from different dates, to *Williams v. Smith* (i). Termina-  
tion of  
tenancy  
from year  
to year.

As to the effect of a disclaimer by a lessee of his lessor's title in determining a lease, see *Calvert v. Frowd* (j).

(x) *Archbold v. Scully*, 9 H. L. C. 360—374.

(y) *Spencer v. Beckett*, 4 Q. B. 601.

(z) 11 Ch. D. 284.

(a) 19 Ch. D. 373.

(b) 13 Ch. D. 330.

(c) *Baines v. Lumley*, 16 W. R. 674.

(d) 4 Y. & C. 399.

(e) *Attorney-General v. Stephens*, 6 D. M. G. 111—146.

(f) P. 26, *ante*. See also *Baines v. Lumley*, 16 W. R. 674; *Martin v. Watts*, 7 T. R. 86; *Clayton v. Blakey*, 8 T. R. 3; *Collins v. Weller*, 7 T. R. 478; *Daniel v. Gracie*, 6 Q. B. 145; *Bishop*

*v. Howard*, 2 B. & C. 100—103; *Fenny v. Child*, 2 M. & S. 255; *Rogers v. Pullen*, 2 Bing. N. C. 749—754; *Tress v. Savage*, 4 El. & Bl. 36—43.

(g) 5 Q. B. 841.

(h) *Gray v. Stanion*, 1 M. & W. 695; *Clarke v. Smaridge*, 7 Q. B. 957; *Chadborn v. Green*, 6 Ad. & El. 658—661; *Robinson v. Dobell*, 1 Q. B. 806—808; *Lyster v. Goldwin*, 2 Q. B. 143—146; *Bessell v. Landsberg*, 7 Q. B. 638; *Bunting v. Sargent*, 13 Ch. D. 330.

(i) 5 A. & E. 350.

(j) 1 Moo. & P. 486.

## WHEN TIME RUNS—LEASE IN WRITING.

3 & 4 Will.  
4, c. 27,  
§ 9.

Lease in  
writing.  
Right  
accrues at  
time of  
wrongful  
receipt of  
rent by  
adverse  
claimant.

9. And be it further enacted,<sup>1</sup> that when any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent, by virtue of a lease in writing, by which a rent amounting to the yearly sum of twenty shillings or upwards shall be reserved, and the rent reserved by such lease shall have been received by some person wrongfully claiming<sup>2</sup> to be entitled<sup>3</sup> to such land or rent in reversion immediately expectant on the determination of such lease, and no payment in respect of the rent reserved by such lease shall afterwards have been made to the person rightfully entitled thereto, the right of the person entitled to such land or rent, subject to such lease, or of the person through whom he claims, to make an entry or distress or to bring an action after the determination of such lease shall be deemed to have first accrued at the time at which the rent reserved by such lease was first so received by the person wrongfully claiming as aforesaid; and no such right shall be deemed to have first accrued upon the determination of such lease to the person rightfully entitled.

Retrospec-  
tive.

<sup>1</sup> This section is retrospective, so as to include cases in which wrongful receipt of rent has commenced before *and been continued since* the passing of the Act. This was laid down in a case (*k*) in which *Evans v. Page* (*ante*, p. 24) was distinguished, and *Jukes v. Sumner* (*ante*, p. 28) followed. But the plaintiff was held, under the circumstances, to be protected by s. 15 (*post*, p. 39).

"Rent"  
in this  
section has  
two mean-  
ings.

"We now come to the 9th section, on which this case turns. The word 'rent' is there used seven times. The first time it means *rent charge*; the second and third, *rent reserved*; the fourth, *rent charge*; the fifth, *rent reserved*; the sixth, *rent charge*; the seventh, *rent reserved*." *Per LORD DENMAN*, C. J. (*l*).

This  
section  
must be  
specially  
pleaded to  
exclude  
§ 3.

Defendants who set up the statute must allege and prove wrongful payment of rent under this section, if the property has been subject to a lease which expired within twelve years before action brought. Otherwise, s. 3 will apply, and time will not commence to run until the

(*k*) *Angell v. Angell*, 9 Q. B. 328—  
358—9.

(*l*) *Angell v. Angell*, 9 Q. B. 328—  
356.

expiration of the lease, although the defendants may have been in actual possession without payment of rent for more than twelve years (m). See cases cited under s. 3 (*ante*, p. 13).

3 & 4 Will.  
4, c. 27,  
§ 9.

And unless the facts pleaded show the receipt of rent to have been, in fact, adverse, it was necessary for a person pleading the statute, and relying on this section under the old practice, to allege specifically that the receipt was "wrongful" or "adverse" (n).

Payment of rent under this section must be to a third person wrongfully claiming. A lessee cannot, by mere non-payment, place himself during the term in the position of such third person, even though he may claim the fee. In such a case time will not run against the lessor till the expiration of the term (o). See also cases cited under s. 3 (p. 13, *ante*).

Pleading this section. Mere non-payment is not wrongful receipt of rent.

"Received . . . . wrongfully requires receipt, not merely by a stranger, but by a person under a claim of title, and that a wrongful one. The mere fact that rent was received and kept by a person other than the right owner no doubt raises a presumption that it was received under a wrongful claim of title; and that is only a presumption, and may be negatived by the circumstances. . . . There may be a wrongful claim to a rent reserved on a lease of land which would not be a wrongful claim of title to the land." *Per* WALSH, M. R. (*Ireland*) (p).

What is wrongful receipt of rent.

Receipt by a person under a supposed title, consistent with that of the rightful owner in reversion, is not wrongful receipt (q); but it is otherwise when a person claims an inconsistent title by mistake (r).

Receipt under supposed title consistent with

Therefore, where a widow who was entitled to a jointure out of lands to which her children were entitled, subject to such jointure, received the entire rent (which exceeded her jointure) during her life, it was held that the statute did not run against her children from the first receipt, but from her death (s).

owner's is not "wrongful."

But where a mother, by mistake, claimed the fee-simple in land to which her son was entitled as tenant in tail, time was held to run from the first receipt of rent by her (t). The same case is an authority for the proposition that the receipt of an agent is that of his principal. The rents were, in fact, received by the son for eighteen years, and paid over by him to his mother, under the impression that she was entitled to the fee-simple. He then died, and the mother continued to receive the rents personally for three years. It was held that, though the son him-

Receipt of agent is receipt of principal, though agent may be lawful owner.

(m) *Chadwick v. Broadwood*, 3 B. 308—316.

(n) *Sloane v. Flood*, 5 L. C. L. R. 75.

(o) *Archbold v. Scully*, 10 H. L. C. 360—380—1.

(p) *Shaw v. Keighron*, L. R. 3 Eq. 574.

(q) *Ibid.*

(r) *Williams v. Pott*, L. R. 12 Eq. 149.

(s) *Shaw v. Keighron*, L. R. 3 Eq. 574.

(t) *Williams v. Pott*, L. R. 12 Eq. 149.

3 & 4 Will. self was actually entitled, he had acted as the agent of his mother, and  
1, c. 27, his heir was barred (u).

**§ 9.**

It is a question whether payment of rent by a sub-lessee to the owner in fee is a wrongful payment within this section so as to bar the intermediate lessee (x).

Payment by sub-lessee to owner in fee.

Disclaimer by lessee of lessor's title may determine lease.

What is such disclaimer.

If a landlord induces his tenant to pay rent to another person (y), or if a tenant does any act contrary to his landlord's title, such as admitting the title of another (z), or setting up a hostile title in himself, or giving possession to another person in order to enable him to set up a hostile title (a), the term is thereupon forfeited and the statute begins to run against the landlord; such an act being a disclaimer of the landlord's title. But it must be shown that the landlord knew of such wrongful act (b).

A mere verbal refusal to pay rent on demand, on the ground that the tenant claims the fee, will not forfeit a definite term under a lease, though it might a tenancy from year to year (c). This decision reconciles the doctrine of disclaimer with the principles laid down in *Archbold v. Scully* (d), *Davey v. Oxenham* (e), and similar cases.

On the question of what amounts to a disclaimer there are several decisions which it is unnecessary here to discuss (f).

MERE ENTRY NOT POSSESSION.

3 & 4 Will. 10.<sup>1</sup>  
4, c. 27,  
**§ 10.**

Mere entry not to be deemed possession. What interrupts adverse possession.

10.<sup>1</sup> And be it further enacted, That no person shall be deemed to have been in possession of any land within the meaning of this Act merely by reason of having made an entry<sup>2</sup> thereon.

<sup>1</sup> This section and s. 11 should be read together (g).

<sup>2</sup> Formerly a mere entry, if with a view of claiming the land, would give the true owner a right to bring ejectment within a given time after such entry. But now, in order to interrupt an adverse possession, so

(u) *Williams v. Pott*, L. R. 12 Eq. 149.

(x) *Drew v. Lord Norbury*, 3 Jo. & La. T. 267; *Hayes v. Woodley*, 3 Ir. Ch. R. 142—150.

(y) *Downs v. Cooper*, 2 Q. B. 256.

(z) *Hornden v. Lord Annesley*, 2 Sch. & Lef. 624—5.

(a) *Ellerbrock v. Flynn*, 1 Cr. M. & R. 137.

(b) *Meredith v. Gilpin*, 6 Price, 146—153.

(c) *Graves v. Wills*, 10 A. & E. 427—436.

(d) 10 H. L. C. 380—1.

(e) 7 M. & W. 560.

(f) *Gray v. Stanion*, 1 M. & W. 695; *Williams v. Cooper*, 1 Man. & Gr. 135; *Williams v. Pasquali*, Peake, N. P. C. 196; *Meredith v. Gilpin*, 6 Price, 146—153; *Fenner v. Diplock*, 9 Mon. 38.

(g) *Baker v. Coombes*, 9 C. B. 718.



that the statute will cease to run, such an entry is not sufficient; there must be an actual taking possession by the true owner. Even an entry accompanied by acts of ownership, such as the removal of a stone from a wall, or the pulling down of a fence, is not sufficient resumption of possession (h). 3 & 4 Will.  
4, c. 27,  
§ 10.

This section probably applies to all cases of adverse possession; but from the cases cited under s. 7 (i), it may be gathered that an entry which would be insufficient in the case of adverse possession, may nevertheless be a sufficient resumption of possession to determine a tenancy at will. Entry de-  
termines  
tenancy at  
will.

As to whether a person in possession is a tenant at will or a tenant at sufferance, see the cases cited under s. 7 (i).

## CONTINUAL CLAIM.

11. And be it further enacted, that no continual or other claim upon or near any land shall preserve any right of making an entry or distress, or of bringing an action. 3 & 4 Will.  
4, c. 27,  
§ 11.

Continual claim was a formal entry, or (in case of resistance) claim to enter, with a declaration that such entry was for the purpose of taking possession. A mere demand by a mortgagor for an account was not equivalent to an entry (j). Continual  
claim not  
to preserve  
right.

## JOINT TENANTS, ETC.

12.<sup>1</sup> And be it further enacted,<sup>2</sup> that when any one or more of several persons entitled to any land or rent as coparceners, joint tenants, or tenants in common, shall have been in possession or receipt of the entirety,<sup>3</sup> or more than his or their undivided share or shares of such land or of the 3 & 4 Will.  
4, c. 27,  
§ 12.  
Possession  
of joint  
owners,

(h) *Baker v. Coombes*, 9 C. B. 718.

*v. Llewellyn*, 27 L. J. N. S. Ex. 297.

(i) *Ante*, p. 26. See also *Randall v. Sterens*, 2 El. & Bl. 641; *Brassington*

(j) *Hodde v. Hea'ey*, 1 V & B. 536 —540.



3 & 4 Will. 4, c. 27,  
§ 12. profits thereof, or of such rent, for his or their own benefit, or for the benefit of any person or persons other than the person or persons entitled to the other share or shares of the same land or rent, such possession or receipt shall not be deemed to have been the possession or receipt of or by such last-mentioned person or persons, or any of them.<sup>4</sup>

may be adverse to each other under this Act.

Old law. Possession not adverse. <sup>1</sup> The old law on this subject is thus laid down in Burton's Real Property (*k*). "It has been mentioned that the fine of a joint tenant or tenant in common (and consequently that of a coparcener) though purporting to comprise the whole land, will not of itself affect the estate of the conusor's companion, nor will his simply taking all the profits of the land without accounting to his companion, constitute such an *adverse possession* as by lapse of time will make the claims of the latter unavailable. If nothing further has been done to his prejudice he must be considered as still in possession."

Sect. 12 is retrospective. <sup>2</sup> This section is retrospective and makes the possession of all coparceners, tenants in common, and joint tenants separate, not merely from the passing of the Act, but from the time when their joint estate commenced (*l*). From this it would appear that if a joint tenant had been in possession of the whole of the land subject to the joint tenancy for twenty years before the passing of the Act, the other joint tenants might have been absolutely barred before the Act came into operation, if they were not protected by s. 15. But it was held that such a possession was not "adverse" previously to the passing of the Act, although it became so immediately afterwards (*m*), and that s. 15 therefore gave the excluded joint tenants the right to bring an action within five years, after which time they would be absolutely barred (*n*).

Possession becomes adverse from passing of Act only. Possession of entirety of any portion. <sup>3</sup> This section applies to cases in which a joint tenant has been in possession of the entirety of *any portion* of the land in which he is entitled to an undivided share. Possession of the entirety of *the whole* of such lands is unnecessary; and it is immaterial whether the portion of the entirety of which he is in possession is of greater or less value than his undivided share of the whole (*o*).

<sup>4</sup> Actual enjoyment for twenty [or, now, twelve] years, contrary to a plaintiff's right, is a clear bar under the statute (*p*). Therefore where

(*k*) 5th ed., pp. 161—2.

(*l*) *Holt v. Horrocks*, 1 Car. & Kir. 566; *Culley v. Taylerson*, 11 A. & E. 1008.

(*m*) *O'Sullivan v. M'Swiney*, 2 Ir. L. R. 95; *Long. & Town*, 111—119.

(*n*) *Culley v. Taylerson*, 11 Ad. & El. 1008.

(*o*) *Murphy v. Murphy*, 15 L. C. L. R. 205.

(*p*) Sect. 34, *post*, p. 75; *Incorporated Society v. Richards*, 1 Dn & War. 289.

four of five equitable tenants in common in fee had been in actual possession of the entirety for more than twenty years to the exclusion of their co-tenant, he was held to be barred (q). 3 & 4 Will.  
4, c. 27,  
§ 12.

Two persons were in possession for more than twenty years, of the entirety of property, to two undivided third parts of which they were entitled. On the death of one of them, the survivor was held to be entitled for his own benefit to the one-third to which they had acquired title under the Act (r).

Questions bearing upon this section also arose in other cases, to which references are given below (s).

#### YOUNGER BROTHER'S POSSESSION.

**13.** And be it further enacted, that when a younger brother or other relation of the person entitled as heir to the possession or receipt of the profits of any land, or to the receipt of any rent, shall enter into the possession or receipt thereof, such possession or receipt shall not be deemed to be the possession or receipt of or by the person entitled as heir.<sup>1</sup> 3 & 4 Will.  
4, c. 27,  
§ 13.  
Possession of younger brother or other relation may be adverse to heir.

<sup>1</sup> Formerly the possession of a younger brother or other relation of an heir was, in many cases, not considered adverse, and time would not run against the heir during such possession. But the passing of this Act rendered such possession adverse for the future, although a 15 would give a saving of five years, as in the case of joint owners (a). Even before this Act there were cases in which the unexplained possession of a relation was considered adverse to the heir (b). Old law.

(q) *Burroughs v. M'Creight*, 1 Ja. & La. T. 290—303. See also *Williams v. Williams*, L. R. 2 Ch. 294—301.

(r) *Ward v. Ward*, L. R. 6 Ch. 789.

(s) *M'Mahon v. Burchell*, 2 Phil. C. C. 127; *Henderson v. Eason*, 7

C. B. 303—306; *Ley v. Peter*, 3 H. & N. 101; and *Bolling v. Hobday*, 31 W. R. 9.

(a) *Jones v. Jones*, 16 M. & W. 699—712.

(b) *Draper v. Lawley*, 13 Q. B. 954. See also *Thomas v. Thomas*, cited, 41, post.

## ACKNOWLEDGMENT OF TITLE.

3 & 4 Will.  
4, c. 27,  
§ 14.

Acknow-  
ledgment  
of title to  
be equiva-  
lent to  
right of  
entry.

**14.** Provided always, and be it further enacted, that when any acknowledgment<sup>1</sup> of the title of the person entitled to any land or rent<sup>2</sup> shall have been given to him or his agent in writing, signed by the person in possession<sup>3</sup> or in receipt of the profits of such land, or in receipt of such rent, then such possession or receipt of or by the person by whom such acknowledgment<sup>4</sup> shall have been given shall be deemed, according to the meaning of this Act, to have been the possession or receipt of or by the person to whom or to whose agent such acknowledgment shall have been given at the time of giving the same, and the right of such last-mentioned person, or any person claiming through him, to make an entry or distress, or bring an action to recover such land or rent, shall be deemed to have first accrued at and not before the time at which such acknowledgment, or the last of such acknowledgments if more than one, was given.

“The moment after a man signs an acknowledgment, the time begins to run against the person to whom the acknowledgment is made.” *Per* LORD ST. LEONARDS (c).

Acknow-  
ledgment  
question  
for court  
if question  
of con-  
struction;  
but for  
jury if of  
intention.

<sup>1</sup> The question whether what has been done amounts to an acknowledgment under this section is, in some cases, a question for the court, and in others for the jury, to decide. If it turns on the mere *construction* of a written document, it is for the court: if it is a question of the *intention* of the parties, it is for the jury; and it is immaterial whether such intention is to be gathered from a series of letters or from a written document explained by parol evidence (d).

Acknow-  
ledgment  
by agent  
not suf-  
ficient.

<sup>2</sup> It will be observed that this section requires an acknowledgment to be signed by the person in possession, and accordingly, although it may be given to the agent of the person entitled, an acknowledgment signed by the agent of the person in possession is of no avail (e). It

(c) *Burroughs v. M'Creight*, 1 Jo. & La. T. 304. See also *Scott v. Nixon*, 3 Dru. & War. 404.

(d) *Morrell v. Frith*, 3 M. & W. 402—404—5; *Curzon v. Edmonds*, 6

M. & W. 295—302; *Incorporated Society of Dublin v. Richards*, 1 Dru. & War. 258—290.

(e) *Ley v. Peter*, 6 W. R. 437—438; 3 H. & N. 110—111.

should, however, be observed, that in the case in question the document relied upon as an acknowledgment did not purport to be signed as agent for, or with the authority of, the alleged principal. On the other hand, where an acknowledgment was signed by an agent by the direction *and in the presence* of the person in possession, it was held that there was sufficient evidence of acknowledgment to go before a jury, such a signature being presumably equivalent to signature under a power of attorney (*f*).

3 & 4 Will.  
4, c. 27,  
§ 14.

The cases on acknowledgments under ss. 28, 40 and 42 (*g*) may be profitably compared with those cited under this section. It will be observed that, in all cases, an acknowledgment to the agent of the owner is sufficient; but under the present section and s. 28 it must be given by the person in possession and not by his agent, while, under ss. 40 and 42, it may be given *by* as well as *to* an agent.

Acknowledgments  
under  
§§ 14, 28,  
40, 42.

\* Where negotiations for a tenancy were pending between a person who claimed to be entitled to land and another who was in adverse possession, the following letter from the latter to the steward of the former was held not to amount to an acknowledgment:—

What  
amounts  
to an ac-  
knowledg-  
ment.

“Dear Sir,—Although, if matters were contested, I am of opinion that I should establish a legal right to the premises, yet, under all circumstances, I have at length made up my mind to accede to the proposal you made of paying a moderate rent on an agreement for a term of twenty-one years.” The negotiations subsequently fell through (*h*).

Letter  
claiming  
adverse  
title.

Where the person in possession knew that the title of the claimants was doubtful, and himself claimed an incumbrance on the property against the claimants in case their title might be good, and these facts appeared from a long correspondence, which resulted in an agreement (which was never executed) to refer the claims of the parties to arbitration, such correspondence was held to amount to an acknowledgment within this section (*i*).

Corre-  
spondence  
casting  
doubt on  
title.

Letters from an occupier to a claimant of land, containing the following expressions, were held to amount to an acknowledgment: “I wish an arrangement to be made on reasonable terms, and due consideration and compensation to be made.”—“I was involved in law from 1805 to 1816 concerning Four Lords’ Lands, which has given me great trouble and expense; and with respect to the expenses, it is reasonable that the lords of the fee should make me some recompense accordingly.”—“It appears reasonable that Mr. F. should vindicate his right to the land rather than that the expenses should fall upon the tenants, and I

Series of  
letters  
admitting  
tenancy.

(*f*) *Corporation of Dublin v. Judge*, 11 L. L. R. 8; *Earl Spencer v. Berrett*, 4 Q. B. 601.

(*g*) Pp. 70, 87 and 96, *post*.

(*h*) *Curzon v. Edmonds*, 6 M. & W. 295—299.

(*i*) *Incorporated Society of Dublin v. Richards*, 1 Dru. & War. 258—290.

3 & 4 Will. 4, c. 27, § 14. beg compassion, merey, and pity, and recompense in a satisfactory manner." The court considered the letter speaking of litigation from 1805 to 1816 alone, an admission that rent was due, as it was written in

Parol evidence as to payment of rent.

answer to a demand for rent. In the same case, the question arose whether a parol statement by a deceased rent collector that he had received rent from the defendant was evidence of the landlord's title against the defendant, but it was unnecessary to decide it (*k*).

Deed operates from execution.

A mortgage deed, dated in 1827 but actually executed in 1834, under which no interest was paid until ejectment was brought in 1854, was held to be a sufficient acknowledgment of the mortgagor's title *at the time of execution*. For this purpose the deed must be considered as speaking from the time of actual execution, and not from the time of its date (*l*).

Letter from agent to agent.

Where a defendant and his predecessors in title had been in possession of the entirety of land to which they and the plaintiff were entitled as tenants in common, a letter from the defendant's land agent to the plaintiff's agent containing the following words was held not to be an acknowledgment within this section, although written less than twenty years before the action: "Mr. J. T. H. Peter is now in possession of his two-thirds of the meadow referred to by you, who will no doubt accept a lease (three lives) for Ley's one-third at a fair rack rent. You must be aware that Mr. Peter, junior, is not bound to pay rent for Ley's one-third during the time his father held the meadow, but no doubt he will do so in case you agree for a lease." Even had the letter, in itself, amounted to an acknowledgment, BRAMWELL, WATSON and CHANNELL, BB. were of opinion that it would not have been admissible in evidence against the defendant, while MARTIN, B. entertained no doubt that it would (*m*).

Answer in Chancery.

An answer in a Chancery suit, admitting the plaintiff's title, was held a sufficient acknowledgment to bind a person claiming under the person who filed the answer (*n*).

Inscription on wall.

It appears that an inscription upon a stone, built into a boundary wall, stating the name of the builder and that the wall is his property, may amount to a perpetual acknowledgment (*o*).

(*k*) *Fursdon v. Clegg*, 10 M. & W. 572.

(*l*) *Jayne v. Hughes*, 10 Ex. 430—433.

(*m*) *Ley v. Peter*, 3 H. & N. 101.

(*n*) *Goode v. Job*, 1 El. & El. 6. And see *Re West*, 3 L. R. Ir. 77.

(*o*) *Phillipson v. Gibbon*, L. R. 6 Ch. 428—434.

SAVING TILL 1838 IN CERTAIN CASES.

15. Provided also, and be it further enacted, that when no such acknowledgment as aforesaid shall have been given before the passing of this Act, and the possession or receipt of the profits of the land, or the receipt of the rent, shall not at the time of the passing of this Act have been adverse to the right or title of the person claiming to be entitled thereto, then such person, or the person claiming through him, may notwithstanding the period of twenty years hereinbefore limited shall have expired, make an entry or distress, or bring an action to recover such land or interest,<sup>1</sup> at any time within five years next after the passing of this Act.<sup>2</sup>

3 & 4 Will.  
4, c. 27,  
§ 15.

Saving of  
five years  
in cases  
where pos-  
session not  
adverse to  
person en-  
titled at  
passing of  
Act.

<sup>1</sup> *Semble* that the word "interest" in this section, though on the Parliament roll, is a clerical error, and should have been "rent." *Per* LORD DENMAN, C. J. (p).

<sup>2</sup> This section mitigated the hardship which might otherwise have been caused by the retrospective effect of certain sections of the Act in barring the title of a claimant whose right of entry had been deemed to accrue more than twenty years before the passing of the Act. In order to avail himself of the protection of this section, however, a claimant was obliged to prove (a) that no acknowledgment had been made within twenty years before, (β) that possession was not adverse to him immediately before the passing of the Act. This section applied, although the Act might itself render possession adverse for the future (q).

Effect of  
this sec-  
tion.

This section is now of so little practical importance that it is unnecessary to consider the difference between adverse possession previously and subsequently to the passing of the Act. Some remarks upon that point will, however, be found in the notes to s. 3 (r).

(p) *Angell v. Angell*, 9 Q. B. 360.  
(q) *Holmes v. Newlands*, 11 A. & E. 44—51; *Culley v. Taylerton*, 11 A. & E. 1008—1018. See also remarks

of PATTERSON, J. in *Jones v. Williams*, A. & E. 291.  
(r) *Ante*, pp. 11 and 12.

## SAVING FOR DISABILITIES.

3 & 4 Will.  
4, c. 27.

**§ 16.**

Saving in  
case of  
certain dis-  
abilities.

Ten years  
further  
time till  
1st Jan.,  
1879.

**16.** <sup>1</sup> *Provided always, and be it further enacted, that if at the time at which the right of any person to make an entry or distress, or bring an action to recover any land or rent, shall have first accrued as aforesaid, such person shall have been under any of the disabilities hereinafter mentioned (that is to say), infancy, coverture, idiotcy, lunacy, unsoundness of mind, or absence beyond seas,<sup>2</sup> then such person, or the person claiming through him, may, notwithstanding the period of twenty years hereinbefore limited shall have expired, make an entry or distress, or bring an action to recover such land or rent, at any time within ten years next after the time at which the person to whom such right shall first have accrued as aforesaid shall have ceased to be under any such disability, or shall have died (which shall have first happened).*

<sup>1</sup> This is one of the sections repealed as from 1st Jan., 1879, by the R. P. L. A. 1874 (s).

<sup>2</sup> It will be seen, however, that it is substantially re-enacted as s. 3 of the last-mentioned Act, with the necessary substitution of the new periods of limitation, viz. twelve and six years for the old periods of twenty and ten years, and the omission of "absence beyond seas" as a disability. By s. 4 of the Act of 1874, the saving which formerly existed in case of such absence is expressly taken away. This provision places actions for the recovery of real and personal estate upon the same footing in this respect (t).

Sects. 3 and 4 of the R. P. L. A., 1874, are as follows :—

37 & 38  
Vict. c. 57,  
**§ 3.**

After-  
wards only  
six years.

**[3.]** <sup>1</sup> *If at the time at which the right of any person to make an entry or distress, or to bring an action or suit to recover any land or rent, shall have first accrued as aforesaid, such person shall have been under any of the disabilities<sup>2</sup> hereinafter mentioned (that is to say), infancy,<sup>3</sup> coverture, idiotcy, lunacy,<sup>4</sup> or unsoundness of mind, then such person, or the person claiming through him may, notwithstanding the period of twelve years, or*

(s) 37 & 38 Vict. c. 57.

(t) See 19 & 20 Vict. c. 97, s. 10.

six years (as the case may be), hereinbefore limited, shall have expired, make an entry or distress, or bring an action or suit to recover such land or rent at any time within six years next after the time at which the person to whom such right shall first have accrued<sup>5</sup> shall have ceased to be under any such disability, or shall have died (whichever of those two events shall have first happened).

3 & 4 Will.  
4, c. 27,  
§ 16.  
37 & 38  
Vict. c. 57,  
§§ 3, 4.

4. The time within which any such entry may be made, or any such action or suit may be brought as aforesaid, shall not in any case after the commencement of this Act be extended or enlarged by reason of the absence beyond seas during all or any part of that time of the person having the right to make such entry, or to bring such action or suit, or of any person through whom he claims].

37 & 38  
Vict. c. 57,  
§ 4.  
— — —  
Absence  
beyond  
seas not to  
be a dis-  
ability in  
future.

<sup>1</sup> The following decisions under s. 16 of the Act of 1833 will be equally applicable, *mutatis mutandis*, to s. 3 of the Act of 1874.

<sup>2</sup> In a case under s. 22 (*u*), it was held that where time had commenced to run against a tenant in tail, it continued to run against his heiress in tail after his death, although she was under disability, and that she did not come within the provision of s. 16 (*v*).

Heir in  
tail.

<sup>3</sup> As regards infants, the provisions of these sections only come into operation when the possession of some other person, during the disability, has been adverse. In other cases time does not begin to run under s. 2 until the infant attains twenty-one, and he therefore has the full time of twenty [or twelve] years, instead of the ten [or six] years limited by these sections, from his majority, within which to bring an action. As to what is adverse possession, see s. 3 of the Act of 1833, *ante*, pp. 11 and 12. Where a father entered and received the rents and profits of land to which his infant son was entitled, it was held that he so entered as the guardian of the infant, and that his possession was therefore not adverse. This decision was grounded on the principle before-mentioned, that possession which can be referred to a lawful title is never considered adverse (*x*). In the same case a distinction was drawn by LORD HATHERLEY between possession by a guardian and possession by a stranger. Either may be treated by an infant as his bailiff for the

Infant.

(u) *Post* p. 48.

(v) *Goodall v. Skerratt*, 3 Drew. 216.

(x) *Thomas v. Thomas*, 2 K & J.

79—84.



3 & 4 Will 4, c. 27, § 16. 37 & 38 Vict. c. 57, §§ 3, 4. purpose of enforcing an account of the rents and profits (y); but the possession of a mere stranger would be considered sufficiently adverse to bring the sections under discussion into operation instead of s. 2 of 3 & 4 Wm. 4, c. 27, and so give the infant only ten [or six] years after attaining his majority within which to make a claim. The case above referred to was observed upon and substantially followed by STUART, V.-C. (z), whose decision was affirmed on appeal (TURNER, L.J., *dubitante*) (a), in a case where the possession of the uncle of an infant (who was also her nearest male relative and the executor of her father's will) was held not adverse. It should, however, be remarked, that he had applied the rents and profits in keeping down the interest on a mortgage affecting the property.

**Lunatic.** 4 In an Irish case (b) it was held that a lease for lives with a covenant for perpetual renewal by a lunatic was void, and that the heir of the lessee had not acquired the fee-simple, although the lessee held under the lease, and a confirmation thereof by the committee of the lunatic, from 1787 to his death in 1836 (upon which the term ended), and his heir thenceforth received the rents and profits till 1842.

**Mort-gagee.** The saving for disabilities does not apply as between a mortgagor and a mortgagee in possession (c).

5 As to the distinction between the time when a right of entry is "deemed to accrue" under ss. 2 and 3 of the Act of 1833, and the time when such right actually accrues in certain cases, and the hardship wrought by the failure of s. 16 to give protection to a person who falls under disability after the right is "deemed" to accrue but before such right can be exercised, the remarks of PARKE, B. (d), and PATTERSON, J. (e), are worthy of attentive perusal. It is remarkable that the Act of 1874 contains no provision calculated to remove this hardship.

**Successive disabilities.** Where successive disabilities in the same person occur without any interval, such person has ten [or six] years from the termination of the last disability, within which to bring an action. In a case in the Court of Exchequer (f), where a female infant married, MARTIN, B., said, "The party never at any time being free from disability, the disability, though due to different causes, must be looked upon as one continued thing." This view appears to be confirmed by the reference to "one or

(y) *Blomfield v. Eyre*, 8 B. 250—258; *Wyllie v. Ellice*, 6 H. 505; *Morgan v. Morgan*, 1 Atk. 489.

(z) *Pelly v. Bascombe*, 4 Giff. 390—395.

(a) 16 W. R. 306; 34 L. J. (Ch.) 227.

(b) *Fulton v. Creagh*, 3 Jo. & La. T. 329. See also cases cited under s. 24, *post*, p. 52.

(c) *Kinsman v. Rouse*, 17 Ch. D. 104; *Forster v. Patterson*, 17 Ch. D. 132.

(d) *Owen v. De Beauvoir*, 16 M. & W. 567.

(e) *De Beauvoir v. Owen*, 5 Ex. 179—182.

(f) *Borrois v. Ellison*, L. R. 6 Ex. 128.

more of such disabilities" in s. 17 of 3 & 4 Wm. 4, c. 27, and s. 5 of 3 & 4 Will. 37 & 38 Vict. c. 57, and is, of course, subject to the provisions of those sections, in case the ten [or six] years above mentioned exceed forty [or thirty] years from the commencement of the first disability (g).

4, c. 27,  
§ 16.  
37 & 38  
Vict. c. 57,  
§§ 3, 4.

## DISABILITIES—EXTREME SAVING.

17. *Repealed by s. 9 and superseded by s. 5 of the R. P. L. A., 1874, as from January 1, 1879.*

3 & 4 Will.  
4, c. 27,  
§ 17.

Sect. 5 of the R. P. L. A., 1874, is as follows :—

[5. No entry, distress, action, or suit<sup>1</sup> shall be made or brought by any person who at the time at which his right to make any entry or distress, or to bring an action or suit to recover any land or rent, shall have first accrued, shall be under any of the disabilities hereinbefore mentioned, or by any person claiming through him, but within thirty<sup>1 2</sup> years next after the time at which such right shall have first accrued, although the person under disability at such time may have remained under one or more of such disabilities during the whole of such thirty<sup>1</sup> years, or although the term of six<sup>1</sup> years from the time at which he shall have ceased to be under any such disability, or have died, shall not have expired.<sup>3</sup>]

37 & 38  
Vict. c. 57,  
§ 5.

Extreme  
period of  
limitation  
in case of  
disabilities  
not to ex-  
ceed thirty  
years in  
subsequent  
actions.

<sup>1</sup> The new section merely inserts the word "suit" after "action" as to which see notes to s. 1 of the Act of 1874 (h), and substitutes thirty years and six years respectively for the forty years and ten years given by the Act of 3 & 4 Wm. c. 27.

Effect of  
new sec-  
tion.

<sup>2</sup> It appears to have been thought by LORD ST. LEONARDS, and other eminent authorities, that the effect of fixing forty years as the extreme period to be allowed to persons under disability would have the effect of diminishing "the length of abstracts," and that a forty years' title would be accepted by conveyancers instead of the sixty years' title upon which they had previously insisted. That such has been the practical effect of the provision, in many instances, can scarcely be doubted; but in 1844, it was decided by LORD LYNTHURST, C., that the rule requiring

Relation  
between  
extreme  
period of  
limitation  
and length  
of title  
required  
on a sale.

(g) See next note, and also *Supple v. Raymond, Hayes, 6.* (h) P. 8, *ante.*

3 & 4 Will. 4, c. 27, § 17. 37 & 38 Vict. c. 57, § 5. a sixty years' title remained unaffected by this statute, one ground of that rule being the duration of human life (i). The same view has been taken by several conveyancers of eminence; and although a shorter period has often been accepted as a good holding title, the right of a purchaser on an open contract to a clear sixty years' title was maintained by the Courts of Equity until the end of 1874. It is, however, a significant comment upon the opinion of LORD LYNCHURST that the Legislature has, almost simultaneously with the enactment reducing the extreme period of limitation to thirty years, limited a purchaser's right to the forty years, which LORD ST. LEONARDS, nearly forty years ago, considered a sufficient title (k).

\* Where a husband, seized in right of his wife, conveyed the estate without her concurrence, SHADWELL, V.-C., held the case not to be within s. 17, and that the effect of such a conveyance was only to pass the legal estate which the husband had during the coverture. A right of action would therefore accrue to the wife or her heir, under the portion of s. 3 relating to future estates, upon the termination of the coverture, although a person might have been in possession under such conveyance more than forty years (l).

#### SUCCESSIVE DISABILITIES.

3 & 4 Will. 4, c. 27, § 18. 18. Provided always, and be it further enacted that when any person shall be under any of the disabilities hereinbefore mentioned at the time at which his right to make an entry or distress, or to bring an action to recover any land or rent, shall have first accrued, and shall depart this life without having ceased to be under any such disability, no time to make an entry or distress, or to bring an action to recover such land or rent, beyond the said period of twenty<sup>1</sup> years next after the right of such person to make an entry or distress, or to bring an action to recover such land or rent, shall have first accrued, or the said period of ten<sup>1</sup> years next after the time at which such person shall have died,

Successive disabilities. No further time to be allowed for successive disabilities in different persons.

(i) *Cooper v. Emery*, 1 Phil. 389.  
 (k) 37 & 38 Vict. c. 78, s. 1 (p. 158, post).  
 (l) *Jumpsen v. Pitchers*, 13 Sim. 327—332. See also *Fulton v. Creagh*,

3 Jo. & La. T. 329 (cited under s. 16, ante), and compare *Corbyn v. Bramston*, 3 A. & E. 63 (cited under s. 3, ante), and *Raffey v. Harbrow*, 3 A. & E. 67.

shall be allowed by reason of any disability of any other person.<sup>2</sup>

3 & 4 Will.  
4, c. 27,  
**§ 18.**

<sup>1</sup> This section is to be read as from the 1st of January, 1879, as if the term of six years had been mentioned instead of the term of ten years, and as if the term of twelve years had been mentioned instead of the term of twenty years (*m*).

<sup>2</sup> Sect. 16 deals with disabilities in the same person, whether successive or not: the present section provides that where successive disabilities occur in different persons, the last of such persons shall have no further time than that limited by s. 16 on account of his disability immediately succeeding the prior one in his predecessor. It is retrospective so far as to include among "successive disabilities" the disability of a person whose right of action accrued, and who died, before the passing of the Act. This was laid down in a case under s. 16 (*n*), on appeal from the colony of New South Wales, where the statute had been adopted.

How far  
s. 18 is  
retrospec-  
tive.

**19.** And be it further enacted, that no part of the United Kingdom of Great Britain and Ireland, nor the islands of Man, Guernsey, Jersey, Alderney, or Sark, nor any island adjacent to any of them (being part of the dominions of his Majesty), shall be deemed to be beyond seas within the meaning of this Act.

3 & 4 Will.  
4, c. 27,  
**§ 19.**  
Definition  
of "beyond  
seas."

This section will be practically unimportant in future, as absence beyond seas ceased to be a disability after the 1st of January, 1879 (*o*).

**20.** And be it further enacted,<sup>1</sup> that when the right of any person to make an entry or distress, or bring an action to recover any land or rent to which he may have been entitled for an estate or interest in possession, shall have been barred by the determination of the period hereinbefore limited, which shall be applicable in such case, and such person shall at any time during the said period have been entitled to any other estate, interest, right, or possibility, in reversion, remainder,<sup>2</sup> or otherwise,<sup>3</sup> in or to the same land or rent, no entry, distress, or action shall be made or brought by such

3 & 4 Will.  
4, c. 27,  
**§ 20.**  
Where one  
estate is  
barred, all  
future  
estates of  
the same  
person in  
the same  
land shall  
be barred  
unless it

(*m*) 37 & 38 Vict. c. 57, s. 9, p. 99, C. C. 290.  
*post.* (*o*) 37 & 38 Vict. c. 57, s. 4 (*ante*,  
(*n*) *Devine v. Holloway*, 14 M. P. p. 41).

3 & 4 Will.  
4, c. 27,  
§ 20.  
has been  
held by  
another  
person for  
an inter-  
mediate  
estate.

person, or any person claiming through him, to recover such land or rent, in respect of such other estate, interest, right, or possibility, unless in the meantime such land or rent shall have been recovered by some person entitled to an estate, interest, or right which shall have been limited or taken effect after or in defeasance of such estate or interest in possession.<sup>4</sup>

<sup>1</sup> This section should be carefully compared with the last clause of s. 3 of the Act of 1833, s. 5 of the same Act, and s. 2 of the Act of 1874. The effect of the three sections is fully considered in the notes to the last-mentioned section (pp. 21—23, *ante*) and may be summed up as follows:—Time runs against a reversioner from the time when his reversion falls into possession. But if he was the owner of a prior particular estate in the same land, which has been barred, his reversion will also be barred, unless some person claiming an intermediate estate has been in possession. And, now, if time has begun to run against the owner of a particular estate, the reversion will be barred in twelve years from when time so began to run, or in six years from the time when his reversion falls into possession.

<sup>2</sup> X. was entitled, as heir of A., to a lease for lives, which expired in 1835. He was also entitled, as heir of B., to the reversion in fee, expectant on the determination of the lease of the same property. His right to the lease accrued on the death of B. in 1812, but B.'s widow remained in possession till 1843. It was held that X. was barred under this section, and that no new right of entry accrued to him on the determination of the term in 1835 (*p*),

Successive  
rights of  
entry in  
respect of  
the same  
estate.

<sup>3</sup> This section applies to cases where the same person has successive rights of entry in respect of the happening of different events. Land was devised to A. with a proviso that if he "took up" with a Roman Catholic, or died without lawful issue, it should go over to B. B. brought ejectment more than twenty years after the happening of the first event, but within twenty years of the second; and it was held that he was barred by allowing twenty years to elapse from the time when his right first accrued (*q*). It is difficult to reconcile this decision with the rule that no one need take advantage of a forfeiture. See 3 & 4 Wm. 4, c. 27, s. 4. (*r*).

<sup>4</sup> Where copyholds were surrendered to the use of A. and his wife for their lives, with remainder to the husband, and the husband went

(*p*) *Hall v. Mouldale*, 16 M. & W. 395.  
689—698.

(*q*) *Clarke v. Clarke*, L. R. 2 C. L.

(*r*) *Ante*, p. 18.

abroad in 1805 and became bankrupt in 1807, when an assignment in the then usual form was made to his assignee, after which the wife remained in possession till her death in 1841, the question arose whether the husband's remainder was within this section or s. 3 of 3 & 4 Wm. 4, c. 27; and the court considered it to be within s. 3, and held an ejectment by the assignee, after the wife's death, in time. Even if the case had been within this section, the possession of the wife would have amounted to a recovery by her in respect of an estate limited to take effect after or in defeasance of the husband's prior life estate, the determination of which would give the assignee a new right of entry (s).

3 & 4 Will.  
4, c. 27,  
**§ 20.**

#### TENANTS IN TAIL.

**21**<sup>1</sup> And be it further enacted,<sup>2</sup> that when the right of a tenant in tail of any land or rent to make an entry or distress, or to bring an action to recover the same, shall have been barred<sup>3</sup> by reason of the same not having been made or brought within the period hereinbefore limited, which shall be applicable in such case,<sup>4</sup> no such entry, distress, or action shall be made or brought by any person claiming any estate, interest, or right which such tenant in tail might lawfully have barred.<sup>5</sup>

Where time has run out against a tenant in tail, remainderman whom he might have barred shall be excluded.

<sup>1</sup> This is an exception from the rule as to future estates laid down in s. 3 of the Act of 1833, and s. 2 of the Act of 1874.

<sup>2</sup> This section and s. 22 have a retrospective operation (t).

Retrospective.

<sup>3</sup> "If a tenant in tail remains out of possession for twenty [or twelve] years, his neglect bars the issue in tail the same as if he had executed a disentailing deed and conveyed away the estate."—*Per* ALDERSON, B. A tenant in tail became entitled, and entered into possession in 1799, from which date he received the rents and profits till 1807. He died in 1850, without having resumed possession. Held that the heir in tail was barred (u).

Sect. 21 has effect of a disentailing deed.

<sup>4</sup> A feoffment by a tenant in tail, which would not bar the heir in tail independently of the statute, does not bar him under this section; his rights are preserved by s. 38 (x). The following remarks upon this

(s) *Johnson v. Liveredge*, 11 M. & W. 517—525.

*Goodall v. Skerratt*, 3 Drew. 220.

(t) *Austin v. Llewellyn*, 9 Ex. 277;

(u) *Austin v. Llewellyn*, 9 Ex. 276.

(x) *Post*, p. 81.

3 & 4 Will. point were made by PARKE, B. in 1852: "The 21st section applies to  
4, c. 27, the case where the right of entry of a tenant in tail is barred *by his neglect*  
**§ 21.** to make such entry in proper time, not to the case where he has conveyed  
Possession away his right to another and put it out of his power to enter. In the latter  
under con- case, the right of entry is not barred by reason of the same not being  
veyance in made within the period limited, but by reason of his not being able to  
fee by enter against his own conveyance" (y).

tenant in tail does not bar heir in tail. <sup>3</sup> LORD BRAMWELL (then BRAMWELL, B.) observed upon this section as follows: "Sect. 21 means that the owners of all such estates in remainder, as are of such a nature that an ordinary tenant could bar them, shall lose their title by lapse of twenty [now twelve] years, with no possession by tenant in tail" (z). The defendant was lessee of land subject to an inalienable statutory tenancy in tail. His lease expired in 1832, and he held over till 1872, when the heir in tail brought ejectment, and it was held that he was not barred by the statute. In the same case the point was raised whether the section of the Act of 1833 barring a tenant in tail is s. 2 or s. 21; and the opinion of the court was that ss. 1 and 2 would bar a tenant in tail *in possession*, and that s. 21 applied to estates *in remainder or reversion* only (a).

#### TENANTS IN TAIL.

3 & 4 Will. **22.** And be it further enacted,<sup>1</sup> that when a tenant in tail  
4, c. 27, of any land or rent, entitled to recover the same, shall have  
**§ 22.** died before the expiration of the period hereinbefore limited,  
Where which shall be applicable in such case, for making an entry  
time has begun to or distress, or bringing an action to recover such land or rent,  
run against a tenant in no person<sup>2</sup> claiming any estate, interest, or right which such  
tail, it tenant in tail might lawfully have barred shall make an  
shall be deemed to entry or distress, or bring an action to recover such land or  
have run rent, but within the period during which, if such tenant in  
also tail had so long continued to live, he might have made such  
against remainder- entry or distress, or brought such action.  
men whom he might

have barred. <sup>1</sup> "The intention and operation of these sections (21 and 22) were to  
Effect of put remaindermen, whose estates might be barred by the tenant in tail,  
§§ 21 and in the same position as if they claimed under tenants in tail; that is,

(y) *Rimington v. Cannon*, 12 C. B. 34. See notes to s. 23 (*post*, p. 49).

(z) *Earl of Abergavenny v. Brace*, L. R. 7 Ex. 173.

(a) L. R. 7 Ex. 154—171.

the act of the tenant in tail in allowing any portion of the twenty years 3 & 4 Will. 4, c. 27, to run without making an entry or bringing an action, to the extent of the period allowed to elapse, binds the remainderman." *Per* § 22.

KINDERSLEY, V.-C. (b).

<sup>1</sup> When time has commenced to run against a tenant in tail, it continues to run against the heir in tail, although he may be under disability (c).

22 as to estates in remainder.

23.<sup>1</sup> *Repealed by s. 9 and superseded by s. 6 of the R. P. L. A., 1874, as from 1 Jan. 1879.* 3 & 4 Will. 4, c. 27, § 23.

[6.<sup>1</sup> When a tenant in tail of any land or rent shall have made an assurance thereof which shall not operate to bar the estate or estates to take effect after or in defeasance of his estate tail,<sup>2</sup> and any person shall by virtue of such assurance<sup>3</sup> at the time of the execution thereof, or at any time afterwards, be in possession or receipt of the profits of such land, or in the receipt of such rent, and the same person or any other person whosoever (other than some person entitled to such possession or receipt in respect of an estate which shall have taken effect after or in defeasance of the estate tail) shall continue or be in such possession or receipt for the period of twelve years next after the commencement of the time at which such assurance if it had then been executed by such tenant in tail, or the person who would have been entitled to his estate tail if such assurance had not been executed, would, without the consent of any other person, have operated to bar such estate or estates as aforesaid,<sup>4</sup> then, at the expiration of such period of twelve years, such assurance shall be and be deemed to have been effectual as against any person claiming any estate, interest, or right to take effect after or in defeasance of such estate tail.]

37 & 38 Vict. c. 57, § 6.

Under an assurance by tenant in tail which does not bar remainders time runs against remaindermen from when such tenant in tail might have barred them. Time of limitation, 12 years.

<sup>1</sup> *Seems* that this section is not retrospective (d).

<sup>2</sup> Sects. 21 and 22, applied only to estates which a tenant in tail might have barred. The above section applies to remainders which Effect of these sections.

(b) *Goodall v. Skerratt*, 3 Drew, 216. 216—220.

(d) *Penny v. Allen*, 7 D. M. G.

(c) *Goodall v. Skerratt*, 3 Drew, 426.



3 & 4 Will. 4, c. 27, § 23. 37 & 38 Vict. c. 57, § 6. he has been unable to bar, at the time when he has conveyed the property to a purchaser; and provides, in effect, that time shall run in favour of such purchaser from the moment when the power of barring the remainders would have accrued as a present right to the tenant in tail, in case he had made no such conveyance. "The object of the 23rd section was to give effect to acts of a tenant in tail against remaindermen and reversioners, and to give effect to assurances which, although they were effectual to bar the issue, were ineffectual to bar those entitled in remainder." *Per* LORD CRANWORTH, C. (e).

<sup>3</sup> But if there is any such inherent defect in the assurance under which the purchaser claims, that it could never have barred the remainders—no matter when executed—this section will not apply (f).

A conveyance by a tenant in tail, which has not been enrolled, will not bar his issue (g).

<sup>4</sup> This section was considered by HALL, V.-C., who said it was intended to legislate for the case of possession under a base fee; and he accordingly held that possession under a conveyance which passed successive life estates and also a base fee, was not, during the lives of the tenants for life, "possession" "by virtue of such an assurance" as was contemplated by this section. In other words, time did not run until the determination of the life estates (h).

#### EQUITABLE ESTATES.

3 & 4 Will. 4, c. 27, § 24. Equitable estates to be barred in the same time as legal estates. **24.** And be it further enacted,<sup>1</sup> that after the said thirty-first day of December one thousand eight hundred and thirty-three, no person claiming any land or rent in equity<sup>2</sup> shall bring any suit to recover the same but within the period during which, by virtue of the provisions hereinbefore contained, he might have made an entry or distress, or brought an action to recover the same respectively, if he had been entitled at law to such estate, interest, or right in or to the same as he shall claim therein in equity.

Formerly equity followed the law; but <sup>1</sup> Before this enactment Courts of Equity, in obedience to the maxim "Equity follows the Law," had exercised their discretion respecting equitable estates, with a due regard to the rules affecting legal estates

(e) *Penny v. Allen*, 7 D. M. G. 426.

(f) *Anderson v. Anderson*, 30 B. 209—214.

(g) *Morgan v. Morgan*, L. R. 10 Eq. 99—104.

(h) *Mills v. Capel*, L. R. 20 Eq. 692—697.

under the then existing statutes of limitation. But now, according 3 & 4 Will. to LORD ABINGER, C.B., "The statute was also intended to put an end 4, c. 27, altogether to the discretion of Courts of Equity in those cases where § 24. they had before acted by analogy, to the time limited at law. That is now was an analogy founded both on law and good sense ; but it no longer bound to remains in the discretion of the Court, but is incorporated in the do so. statute" (i).

2 "All trusts are now barred by s. 24, unless saved by s. 25" (k). An equitable estate is only barred by the statute to the same extent that a corresponding legal estate would be barred (l).

But before the Judicature Acts came into operation, the ordinary Equitable doctrines of Courts of Equity modified the operation of this section in certain cases. Equitable doctrines qualify this rule

On the one hand, a plaintiff might be barred by *laches*, independently of the statute (m) ; and on the other hand, there were cases in which Equity would grant relief, although the plaintiff's legal title was, strictly speaking, barred. One of such cases was where a plaintiff had been prevented from asserting his legal title by pending proceedings in equity (n). The appointment, by the Court, of a receiver, did not prevent the operation of the statute against a stranger and in favour of a party (o) ; but it prevented time from running in favour of a stranger to the suit (p). The appointment of a receiver in a foreclosure action prevents time from running against an incumbrancer who, although not a party, has notice of the appointment (q). Effect of appointment of a receiver.

Where the person to be sued is a lunatic, time will not run under the statute as a general rule (r). Effect of lunacy.

The carrying over of a fund in lunacy proceedings, to an account showing who are the persons entitled, will suspend the operation of the statute (s) ; but proceedings in lunacy will, in some cases, not be sufficient to prevent time from running (t).

The commencement of an action at law stops time from running under the statute ; and, similarly, it has been held that the filing of a bill in respect of an equitable right had the same effect, subject to the Effect of chancery proceedings.

(i) *Berrington v. Evans*, 1 Y. & C. 439—40 ; *Commissioners, dec. v. Wybrants*, 2 J. & L. T. 195 ; *Knox v. Gye*, L. R. 5 H. L. 656.

(k) *Commissioners, dec. v. Wybrants*, 2 J. & L. T. 196.

(l) *Archbold v. Scully*, 9 H. L. C. 260.

(m) *Harcourt v. White*, 28 B. 303.

(n) *Pyson v. Pole*, 3 Y. & C. 273 ; *Grant v. Grant*, 3 Russ. 598—607 ; *Salmon v. Hart*, K. 607.

(o) *Harrison v. Duignan*, 2 Dr. &

War. 295 ; *Groome v. Blake*, 8 I. C. L. R. 428 ; *Re Butler's Estate*, 13 I. Ch. R. 453.

(p) *Wrizon v. Vize*, 3 Dr. & War. 123 ; *Chinnery v. Evans*, 11 H. L. C. 115.

(q) *Penney v. Todd*, 26 W. R. 502.

(r) *Stedman v. Hart*, K. 607.

(s) *Re Walker*, L. R. 7 Ch. 120.

(t) *Wilkinson v. Wilkinson*, 9 H. 204 ; *Rock v. Cooke*, 1 De G. & S. 675 ; *Ex parte Hawes (Boldero v. Halpin)*, 19 W. R. 320.

8 & 4 Will.  
4, c. 27,  
§ 24.

settled equitable doctrine with regard to *laches*. "What the judges in England and in this country have said as to the effect of a bill with reference to the statute was that, although it was true that the mere filing of a bill would operate of itself to save the bar of the statute, yet that the Court would know how to deal with any improper delay after the filing of the bill; that is, that although the bill might save the bar of the statute, yet that the Court might not give the benefit of it to the plaintiff if there was anything in his conduct to disentitle him to its assistance" (u). Shortly before the Judicature Acts came into operation, a creditor, whose debt was not then barred, issued a writ in the Common Pleas which would save his right of action for six months. Before the six months expired he took out an administration summons in the Court of Chancery, and MALINS, V.-C., held that the writ in the Common Pleas only saved the plaintiff's right of action in that Court; and that as the full time had run against him during the six months, he could not now commence proceedings in Chancery (x). And though a writ issued in any Division of the High Court would now save the plaintiff's right of action in any other Division, the Court will not renew a writ, if the full time limited by the statute has expired since it was issued (y).

A judgment creditor, who took no step to enforce his judgment for twenty years, was held to be barred, and was not allowed to prove in a suit instituted within the twenty years by a specialty creditor, the existence of which he subsequently discovered (z).

The institution of a suit to administer the trusts of a will does not keep alive the rights of the heir, so far as he claims adversely to the will (a).

In a case under the former statute, which has since been much discussed (b) it was held that the commencement of an administration suit by a single creditor saved the bar of the statute in favour of all other creditors, so as to enable them to come in under the decree. The Vice-Chancellor, in giving judgment, said: "Every creditor has, to a certain extent, an inchoate interest in a suit instituted by one on behalf of himself and the rest; and it would be attended with mischievous consequences to the estates of deceased debtors, if the Court were to lay down a rule by which every creditor would be bound either to file his bill or bring his action (c). It should, however, be observed, that two grounds upon which the judgment now under discussion was based

(u) *Forster v. Thompson*, 4 Dru. & War. 808—818. See also *Pampton v. Birchall*, 5 B. 67—74; 11 B. 88.

(x) *Manby v. Manby*, 3 Ch. D. 101.

(y) *Doyle v. Kaufman*, 3 Q. B. D. 7, 340.

(z) *Berrington v. Evans*, 1 Y. & C.

434. See *Lancaster v. Evans*, 10 B. 154; *Tatam v. Williams*, 3 Hare 347.

(a) *Simmons v. Rudall*, 1 Sim. N. S. 115—133—4.

(b) *Sterndale v. Hankinson*, 1 Sim. 393.

(c) *Ibid.* 398.

were, (α) that the statute did not bar the debt, but only the remedy; and (β) that the statute did not bar a suit in equity. As regards creditors who have a charge on land (e.g. judgment creditors), both these grounds have ceased to exist; for it will be remembered that s. 24 of the Act 3 & 4 Will. 4 expressly extends its operation to Courts of Equity; while s. 34 of the same Act enacts that the statute shall bar the right as well as the remedy.

3 & 4 Will.  
4, c. 27,  
§ 24.

Accordingly, it is not surprising that grave doubts have been expressed whether this decision applies to cases within the present statutes; and while, on the one hand, it has been held that judgment creditors, not already barred, may still come in and have priority over other creditors in a suit by a specialty creditor (α); on the other hand, it has been clearly laid down, that an action by another creditor cannot be taken advantage of by a judgment creditor, who was ignorant of its existence till his debt had become barred (ε); but if the action had been commenced with his concurrence, and he had intended to come in under the decree, *quære* whether he might not do so, although time might have run against him since the commencement of the action (f). Questions upon this point have arisen in several cases (g), especially in Ireland, and the decisions are not easily reconcilable. In a recent English case it was held that an administration judgment in December, 1879, could not be taken advantage of by a creditor for money due on a promissory note dated November, 1873 (h).

A mortgage (subject to a trust term) was executed in 1807. In 1809 a bill was filed to administer the trust term, but the mortgagees were not made parties till 1841. It was held that they were barred, and that the existence of the suit did not take the case out of the statute (i).

But where creditors commenced an action to set aside a deed as fraudulent and void under 13 Eliz. c. 5, ten years after the execution of the deed they were held not to be barred, though they had been aware of the deed all the time. Their right was a legal one, which could only be barred by the statutory lapse of time (j).

A claim in respect of equitable waste stands upon the same footing as regards the statute as a claim to the land itself (k). The case supporting this *dictum* was, however, commented on by STUART, V.-C., in the

(d) *Berrington v. Evans*, 3 Y. & C. 384.

(e) *Berrington v. Evans*, 1 Y. & C. 434.

(f) *Ibid.*, p. 440.

(g) *O'Kelly v. Bodkin*, 2 I. Eq. R. 361—369; 3 I. Eq. R. 390; *Hutchins v. O'Sullivan*, 11 I. Eq. R. 443; *Porter v. McKenzie*, 17 B. 414; *Watson v. Birch*, 15 Sim. 523; *Brown v. Lynch*, 4 I. Eq. R. 316; *Carroll v. Darcy*, 10 I. Eq. R. 321; *Bennett v. Rarnard*, 12 I. Eq. R. 229; *Berming-*

*ham v. Burke*, 2 Jo. & La. T. 699—714; *Simpson v. Simpson*, 3 L. R. Ir. 308.

(h) *Re Greaves, Bray v. Tofield*, 18 Ch. D. 551. See also *Glynn v. Glynn*, 49 L. J. Ch. 5.

(i) *Humble v. Humble*, 24 B. 535—540.

(j) *Three Towns Banking Co. v. Maddever*, 28 S. J. 709.

(k) *Duke of Leeds v. Earl of Amherst*, 2 Phil. 117—125.

3 & 4 Will. 4, c. 27, § 24. following terms: "There can be no doubt that, in that case, the Court went to a most extraordinary length—a length unprecedented in any previous case, and which will remain unfollowed in any subsequent case, till a case equally extraordinary shall occur" (l). Legal waste is within the statutes of limitation; and it has been held that time begins to run against a remainderman in respect of timber wrongfully cut by a tenant for life from the time when the timber is cut, and not from the death of the tenant for life, because such cutting is a tortious act (m); and the remainderman is barred in six years, as if his claim were a simple demand (n), even though there may at the time of the tortious act be intermediate contingent equitable estates which never take effect in possession (o).

*Laches* bars independently of the statute. Where a remainderman, who knew that a tenant for life had wrongfully cut timber, did not file a bill till nearly twenty years after the death of the tenant for life, it was held that he was barred by delay, independently of the statute (p).

Foreclosure suits or actions are within s. 24. It was held by SHADWELL, V.-C., that a foreclosure suit was a proceeding for the recovery of money, within s. 40 (q); but his decision was over-ruled by LORD ST. LEONARDS, when Lord Chancellor of Ireland, who said: "It appears to me, therefore, that the right to file a bill of foreclosure, whether the plaintiff's mortgage be a legal or an equitable one, falls within the 24th section of the statute 3 & 4 Will. 4, and the 1 Vict. c. 28; and that the time is governed by the legal right of the party to bring an action; or if he may not have the legal estate, by the right which he would have had if his estate had been a legal instead of an equitable one. If the twenty-fourth section does not extend to a legal mortgage, then it is a *casus omissus* out of the Act; and as the general right of a mortgagee to file a bill of foreclosure is not taken away, equity would once more adopt the legal rule by analogy" (r). The Court of Appeal has in a recent case (s) held that a simple foreclosure action is not an action for the recovery of money under s. 40, but an action to recover land under s. 2.

#### EXPRESS TRUSTS.

3 & 4 Will. 4, c. 27, § 25. 25.<sup>1</sup> Provided always, and be it further enacted, that when any land or rent shall be vested in a trustee upon any express trust<sup>2</sup> the right of the *cestui que trust*, or any

In cases of express

(l) *Morris v. Morris*, 6 W. R. 427—9. Compare *Simpson v. Simpson*, 3 L. R. Ir. 308.

(m) *Seagrave v. Knight*, L. R. 3 Eq. 398; L. R. 2 Ch. 628—632; *Higginbotham v. Hawkins*, L. R. 7 Ch. 676.

(n) *Birch-Wolfe v. Birch*, L. R. 9 Eq. 683—692.

(o) *Simpson v. Simpson*, 3 L. R. Ir. 308.

(p) *Harcourt v. White*, 28 B. 303.

(q) *Dearman v. Wyche*, 9 Sim. 570.

(r) *Wrizon v. Vize*, 3 Dr. & War. 104—118.

(s) *Harlock v. Ashberry*, 19 Ch. D. 539.

person claiming through him, to bring a suit against the trustee, or any person claiming through him, to recover such land or rent, shall be deemed to have first accrued, according to the meaning of this Act, at and not before the time at which such land or rent shall have been conveyed to a purchaser for a valuable consideration, and shall then be deemed to have accrued only as against such purchaser and any person claiming through him.<sup>3</sup>

3 & 4 Will.  
4, c. 27,  
§ 25.

trust time  
only runs  
in favour  
of a pur-  
chaser for  
valuable  
considera-  
tion, and  
only from  
the time of  
his con-  
veyance.

By s. 25, sub-s. 2, of the Judicature Act, 1873 (t), it is enacted that [No claim of a *cestui que trust* against his trustee for any property held on an express trust, or in respect of any breach of trust, shall be held to be barred by any Statute of Limitations.]

36 & 37  
Vict. c. 66,  
§ 25 (2).

Express  
trusts  
under the  
Judicature  
Acts.

Sect. 24 of the last-mentioned Act also provides, in effect, that equitable rights shall be recognised in every branch of the High Court, and also by the Court of Appeal.

<sup>1</sup> The following remarks as to the effect of s. 25 of 3 & 4 Will. 4, c. 27, were made by LORD ST. LEONARDS, when Lord Chancellor of Ireland:—"The 25th section of the late Statute of Limitation, providing for express trusts, renders lapse of time unimportant in all cases within the section, that is, between the *cestui que trust* and his trustee, until the trust is disturbed, and that disturbance can only be affected by such a denial of the trust as takes place, when the trustee sells to a third party for valuable consideration the property so held by him in trust" (u).

Time runs  
in favour  
of a pur-  
chaser for  
value from  
a trustee.

This section applies only to cases where express trusts are declared by some written instrument, and not to circumstances which a Court of Equity would hold to constitute a person a constructive trustee (x).

Sect. 25  
applies  
only to  
express  
trusts.

Accordingly, it has been held that a mere covenant to settle a sum of money does not constitute the covenantor a trustee (y). But when a settlement recited the payment of 1000*l.* by A. to B., and contained a covenant by B. to invest it in the joint names of A. and B. upon certain trusts, when the money had in fact never been paid to B., it was held that a trust within this section was created (z). And where a trust is in existence, a person who is not legally a trustee may constitute himself an express trustee within this section by dealing with the trust property,

Construc-  
tive trusts  
not within  
s. 25.

Acting as  
trustee  
brings a  
person  
within  
s. 25.

(t) 36 & 37 Vict. c. 66.

(u) *Law v. Bagwell*, 4 Dr. & War. 398.

(x) *Petre v. Petre*, 1 Drew. 371—393; *Dickinson v. Teasdale*, 1 De G.

J. & S. 52—59; *Cunningham v. Foot*, 3 Ap. Ca. 974—984.

(y) *Spickernell v. Hotham*, K. 669; *Stone v. Stone*, L. R. 5 Ch. 74.

(z) *Stone v. Stone*, L. R. 5 Ch. 74.

3 & 4 Will. 4, c. 27, and assuming to act as trustee (a). But the case is different where a *cestui que trust* who has only limited interest wrongfully does, for his own benefit, an act which ought to have been done by the trustees for the benefit of all the *cestuis que trustent* (b). Charitable trusts are within this section, and also within s. 24 (c).

Charities are within s. 25.

What is an express trust within s. 25.

The question what amounts to an express trust within the meaning of this section has formed the subject of many decisions; and these have not always been consistent, especially with regard to cases that would fall within s. 40 or s. 42, unless saved by this section.

In an Irish case, it has been held that even an express trust for payment of debts was not within s. 25 (d), but this decision must now be considered as overruled; and it may be laid down, as a general rule, that although a *mere charge* by will of real estate with payment of debts (if the personal estate should prove insufficient) (e) or legacies (f) is not within this section, a devise *upon trust* to pay debts (g) or legacies (h) or annuities (i) is saved by s. 25 from the bar of ss. 40 and 42. So also is a trust term to secure the payment of annuities (k), or to raise legacies or portions (l), although the trust may be to raise "any sum not exceeding" a specified amount (m). A devise and bequest of real and personal estate upon the trusts "hereinafter specially declared," followed by a gift of an annuity, was held not to constitute an express trust for payment of the annuity within this section (n).

After LORD PLUNKETT had expressed a doubt whether a trust for payment of debts amounted to an express trust (o), it was decided that a devise to trustees coupled with a mere charge of debts brought the case within s. 25 (p). Similarly, a devise to trustees upon trust to convey to A., subject to and charged with annuities in favour of charities, was held to constitute A. a trustee within s. 25 (q). But a legal devise of an

(a) *Life Association of Scotland v. Siddal*, 3 De G. F. & J. 58—72; *Sturgis v. Morse*, 3 De G. & J. 1.

(b) *Dane's Estate*, 1 R. 5 Eq. 498.

(c) *St. Mary Magdalen v. Atty.-Genl.*, 6 H. L. C. 189—215; *Atty.-Genl. v. Flint*, 4 H. 147; *Commissioners of Donations v. Wybrants*, 2 Jo. & La. T. 182.

(d) *Young v. Wilton*, 10 I. Eq. R. 10—19.

(e) *Dickinson v. Teasdale*, 1 D. J. & S. 52; *Jacquet v. Jacquet*, 27 B. 332.

(f) *Knox v. Kelly*, 6 I. Eq. R. 279; *Proud v. Proud*, 32 B. 234.

(g) *Jacquet v. Jacquet*, 27 B. 332.

(h) *Watson v. Saul*, 1 Giff. 188.

(i) *Knight v. Bowyer*, 2 De G. & J. 421.

(k) *Salter v. Cavanagh*, 2 D. & Wal. 668; *Lewis v. Duncombe*, 29 B. 175; *Cox v. Dolman*, 2 D. M. G. 592; *Snow v. Booth*, 2 K. & J. 132 (in which *Hunter v. Nockolds*, 1 M. & G. 640, was questioned).

(l) *Blair v. Nugent*, 3 Jo. & La. T. 658—668; *Lawton v. Ford*, L. R. 2 Eq. 97; *Young v. Lord Waterpark*, 13 Sim. 204.

(m) *Gough v. Bult*, 16 Sim. 45—323.

(n) *Cunningham v. Foot*, 3 Ap. Ca. 974.

(o) *Dillon v. Cruise*, 3 I. Eq. R. 70, 81, 82.

(p) *Hunt v. Bateman*, 10 I. Eq. R. 360.

(q) *Commissioners of Donations v. Wybrants*, 2 Jo. La. T. 182.



estate charged with the payment of debts (*r*) or annuities (*s*), without the intervention of trustees, was held not to make the devisee a trustee within s. 25. 3 & 4 Will.  
4, c. 27,  
§ 25.

A devise of land upon trust to sell and pay annuities out of the interest of the proceeds, and until sale out of the rents, is of course an express trust (*t*). So a devise of land upon trust for sale creates an express trust within this section, and will be enforced although the trustees may have been in possession of portions of the land for fifty years (*u*), unless the persons interested in the proceeds of sale have elected to take the property as real estate (*x*). Trust for  
sale is  
express  
trust,  
and s. 25  
extends to  
the pro-  
ceeds of  
sale.

Knight Bruce, V.-C., in 1851, doubted whether or not the proceeds of real estate directed to be sold fell within s. 25 or s. 40 (*y*); but it has since been decided that such proceeds, when there is an express trust, are within s. 25 (*z*).

A devise to testator's son in tail male upon special trust and confidence that he would do nothing to defeat the limitations contained in the will, was held not to create an express trust (*a*).

The conflicting decisions as to what constitutes an express trust sufficient to take cases that would otherwise fall within ss. 40 and 42 out of the operation of the statute, have, however, been brought under the notice of the Legislature, and the following enactment (which forms s. 10 of the Act of 1874) is the result:— New  
enactment  
as to  
express  
trusts  
within  
§§ 40 & 42.

[10. After the commencement of this Act no action, suit, or other proceeding shall be brought to recover any sum of money or legacy charged upon or payable out of any land or rent, at law or in equity, and secured by an express trust, or to recover any arrears of rent or of interest in respect of any sum of money or legacy so charged or payable and so secured, or any damages in respect of such arrears, except within the time within which the same would be recoverable if there were not any such trust.] 37 & 38  
Vict. c. 57,  
§ 10.  
Express  
trust not  
to take  
money or  
legacies  
charged on  
land out of  
§§ 40 & 42.

It is therefore now unimportant, as regards cases provided for by s. 40 or s. 42, whether there is an express trust or not. Such a trust will

(*r*) *Dundas v. Blake*, 11 L. Eq. R. 138.

(*s*) *Francis v. Grover*, 5 H. 39, 50, 51.

(*t*) *Ward v. Arch*, 12 Sim. 472.

(*u*) *Mutlow v. Bigg*, L. R. 18 Eq. 246.

(*x*) *Mutlow v. Bigg*, 1 Ch. D. 385.

(*y*) *Pawsey v. Barnes*, 20 L. J. Ch. 393.

(*z*) *Mutlow v. Bigg*, L. R. 18 Eq. 246; *Gough v. Bult*, 16 Sim. 323; *Burrowes v. Gore*, 6 H. L. C. 907.

(*a*) *Dawkins v. Lord Penrhyn*, 6 Ch. D. 313; 4 Ap. Ca. 51.



3 & 4 Will. 4, c. 27, **§ 25.** no longer save the claim of the *cestui que trust*, as against the land, from being barred; but on the other hand he will, by s. 25, sub-s. 2, of the Judicature Act, 1873 (b), have a right of action against the trustee personally, which no lapse of time will bar. The same right will exist in respect of legacies secured by an express trust, but not charged on land. The wording of s. 10 of the Act of 1874 should be carefully compared with that of s. 40 of 3 & 4 Will. 4, c. 27 (c).

A perpetual annuity, charged on land by deed in 1883, became payable in 1851, but no payment was made or acknowledgment given; and a claim in a partition action made in 1884 was held to be barred (d).

**Power of attorney.** <sup>2</sup> An agent holding a power of attorney is an express trustee for his principal (e).

**Vendor's lien.** A vendor's lien for unpaid purchase-money is not an express trust within this section, but is within s. 40 (f).

A receiver in an action is an express trustee for the persons entitled to the money received by him (g).

**Mortgage by way of trust.** A mortgage by way of trust for sale is not a trust within this section (h). It falls within s. 28, and the fact that there is an express trust of the sale moneys is immaterial (i). Whether a mortgage is by way of trust for sale or otherwise, there is no express trust under this section of the surplus proceeds of sale for the mortgagor (j). Nor is a mortgagee, who has been paid off, an express trustee of the mortgagor (k). The mortgagor upon payment becomes tenant at will to the mortgagee, and if he remains in possession for thirteen years the legal estate reverts in him without any reconveyance (l). But the rule does not apply to a case where a person to whom land is conveyed upon trust to sell and pay off a mortgage to X. and retain a debt due to himself, takes a transfer of the mortgage and remains in possession for more than the statutory period. In such a case time will not run (m).

**Mortgagee in possession under order of Court.** It has been held that a mortgagee of a life estate, who had entered into possession under an order of the Court, was in a fiduciary position with regard to the remaindermen; but this decision was reversed on appeal, and the case held to be within s. 42 (n).

(b) 36 & 37 Vict. c. 66, ante, p. 55.

(c) Post, p. 82.

(d) *Hughes v. Coles*, W. N. (1884) 180.

(e) *Burdick v. Garrick*, L. R. 5 Ch. 233.

(f) *Toft v. Stephenson*, 7 H. 1.

(g) *Seagram v. Tuck*, 18 Ch. D. 296.

(h) *Yardley v. Holland*, L. R. 20. Eq. 428; *Law v. Bagwell*, 4 Dr. & War. 398.

(i) *Locking v. Parker*, L. R. 8 Ch.

30; *Re Alison, Johnson v. Mounsey*, 11 Ch. D. 284; *Warner v. Jacob*, 20 Ch. D. 220.

(j) *Banner v. Berridge*, 18 Ch. D. 254.

(k) *Chapman v. Corpe*, 27 W. R. 781.

(l) *Sands to Thompson*, 22 Ch. D. 614.

(m) *Latter v. Dashwood*, 6 Sim. 462.

(n) *Hickman v. Upsall*, 2 Ch. D. 617; 4 Ch. D. 144.

It was laid down (o), in the House of Lords, by LORD WESTBURY 3 & 4 Will. 4, c. 27, (LORD HATHERLEY, C., *dissentiente*), that no fiduciary relation exists § 25. between a partner and the executors of his deceased partner. 37 & 38

Upon the dissolution of a friendly society, a resolution in effect Vict. c. 57, declaring that its property should be held in trust for creditors, was § 10. held to create an express trust (p).

Trustees of a fund established by civil servants of the East India Company for granting pensions and annuities to members and their widows and children, were held to be trustees, not merely for the association generally, but for the members individually, so as to prevent the claim of a member from being barred by the statute (q). Partners are not trustees *inter se*. Trustees of benefit society are trustees for members.

The possession of a *cestui que trust* under his trustee is not adverse to the trustee within s. 3, nor is he a tenant at will to the trustee within s. 7 (r). His possession is equivalent to that of the trustee (s). Possession of *cestui que trust* is possession of trustee.

Land was reclaimed from the river Thames under the authority of a private Act of Parliament by persons in possession of the adjoining land, under an agreement for a lease for ninety-nine years expiring in 1867. No lease was ever executed. Held that the statute was no bar to the lessors, as the lessees, though legally tenants at will, were in effect *cestuis que trustent* (t).

Where trustees by mistake let the wrong persons into possession as *cestuis que trustent*, it was held that time did not run against the real trustees. Mistake of *cestuis que trustent* (u).

A purchaser from a *cestui que trust*, who has only a limited interest, can set up the statute against a remainderman. He is not an express trustee within this section (x). And the same rule applies to a stranger wrongfully let into possession by such a *cestui que trust* (y).

Where trustees do not act, this section does not apply to persons wrongfully obtaining possession (z).

It has been stated before that after a sale by an ordinary trustee to a *bonâ fide* purchaser for value, s. 25 ceases to apply as between the *cestui que trust* and the purchaser.

And it was held by LORD CRANWORTH and LORD WENSLEYDALE Purchasers and lessees of charity lands. (reversing the decision of LORD ROMILLY) (a), that this section does not apply to the case of a sale of charity lands by trustees to a pur-

(o) *Knox v. Gye*, L. R. 5 H. L. 656.

(p) *Pare v. Clegg*, 29 B. 589.

(q) *Edwards v. Warden*, 1 App. Ca. 281, reversing L. R. 9 Eq. 495.

(r) *Garrard v. Tuck*, 8 C. B. 232.

(s) *Drummond v. Sant*, L. R. 6 Q. B. 763; *Lister v. Pickford*, 13 W. R. 827.

(t) *Drummond v. Sant*, L. R. 6 Q. B. 763.

(u) *Lister v. Pickford*, 13 W. R. 827.

(x) *Petre v. Petre*, 1 Drew. 371.

(y) *Melling v. Leak*, 16 C. B. 652—658.

(z) *Burroughs v. M'Creight*, 1 Jo. & La. T. 290—304.

(a) B. 223.

3 & 4 Will. 4, c. 27, § 25. 37 & 38 Vict. c. 57, § 10. chaser for value so as to make him a trustee for the charity, even though he had notice of the trust (b). And another decision of LORD ROMILLY, setting aside a lease of charity land for 500 years after the lessee had been in possession 128 years, was reversed on appeal, on the ground that the lessors were barred by the statute (c).

This decision was probably based on the fact that such a lease was void under 13 Eliz., c. 10, s. 3, and the lessee had acquired title by adverse possession. Accordingly LORD ROMILLY decided, in 1859, that in the case of an improvident lease by a charity, time began to run in favour of the lessee from the grant of the lease, and that s. 25 did not apply (d). But in 1870, the Vice-Chancellor of Ireland held a purchaser for value from a trustee of charity property, with notice of the trusts, to be an express trustee for the charity within s. 25 (e). In a still more recent case, JESSEL, M. R., held (following *Pennington v. Cardale*) (f) that a lease granted in 1783, for value, at a peppercorn rent for ninety-nine years, by the governors of a charity, was not void, but voidable. Consequently it might at any time be avoided by the governors, and time did not begin to run against them under the statute until they determined to avoid it and brought an action to set it aside (g). But this decision has been reversed by the Court of Appeal (h) and the House of Lords, and it is now established that such a lease is absolutely void (i).

Time no bar in cases of breach of trust, except in favour of an assignee for value.

<sup>3</sup> Time is no bar in the case of a breach of trust (k). And this rule applies as between a *cestui que trust* and the executor of a trustee who has committed a breach of trust (l), and also extends to assets of a trustee who has committed a breach of trust in the hands of the administrator of his executor (m). But an assignee for value with notice of a breach of trust is not an express trustee (n).

Minor questions upon this section have been raised in several other cases (o) which may be referred to incidentally.

(b) *Magdalen College v. A.-G.*, 6 H. L. C. 189.

(c) *Att.-Gen. v. Duvey*, 19 B. 251; 4 De G. & J. 186.

(d) *Att.-Gen. v. Payne*, 27 B. 168—174.

(e) *Att.-Gen. v. Davis*, 18 W. R. 1132.

(f) 3 H. & N. 656—666.

(g) *Magdalen Hospital v. Knotts*, 5 Ch. D. 175—180.

(h) 8 Ch. D. 709.

(i) *Magdalen Hospital v. Knotts*, 4 Ap. Ca. 324.

(k) *Life Association of Scotland v. Siddull*, 3 De G. F. & J. 58—72.

(l) *Brittlebank v. Goodwin*, L. R. 5

Eq. 545.

(m) *Woodhouse v. Woodhouse*, L. R. 5 Ch. 514.

(n) *Pyrah v. Woodcock*, 24 L. T. N. S. 407.

(o) *Watson v. Woodman*, L. R. 20 Eq. 721; *Sleeman v. Wilson*, L. R. 18 Eq. 36; *Cadbury v. Smith*, L. R. 9 Eq. 37; *Butler v. Carter*, L. R. 5 Eq. 276; *Prowse v. Spurgin*, L. R. 5 Eq. 99; *Binns v. Nichols*, L. R. 2 Eq. 256; *Shaw v. Johnson*, 1 Dr. & S. 412; *Round v. Bell*, 30 B. 121; *Lord Clanricarde v. Heming*, 30 B. 175; *Henderson v. Atkins*, 7 W. R. 387; *Thompson v. Simpson*, 1 Dr. & War. 459—489; *Chulmer v. Bradley*, 1 Jac. & W. 51.

CONCEALED FRAUD.

**26.** And be it further enacted, that in every case of a concealed fraud<sup>1</sup> the right of any person to bring a suit in equity for the recovery of any land or rent of which he, or any person through whom he claims, may have been deprived by such fraud, shall be deemed to have first accrued at and not before the time at which such fraud shall or with reasonable diligence<sup>2</sup> might have been first known or discovered; provided that nothing in this clause contained shall enable any owner of lands or rents to have a suit in equity for the recovery of such lands or rents, or for setting aside any conveyance of such lands or rents, on account of fraud, against any *bond fide* purchaser<sup>3</sup> for valuable consideration who has not assisted in the commission of such fraud, and who at the time that he made the purchase did not know and had no reason to believe<sup>4</sup> that any such fraud had been committed.<sup>5</sup>

3 & 4 Will.  
4, c. 27,  
§ 26.

Concealed fraud—  
time only runs from discovery by reasonable diligence, except in favour of a *bond fide* purchaser.

<sup>1</sup> “What is meant by concealed fraud? It does not mean the case of a party entering wrongfully into possession; it means a case of designed fraud, by which a party, knowing to whom the right belongs, conceals the circumstances giving that right, and by means of such concealment, enables himself to enter and hold.” *Per* KINDERSLEY, V.-C. (*p*).

Meaning of “concealed fraud.”

The omission by an insolvent from his schedule of reversionary interests in freehold and copyhold property to the equity of redemption of which he was entitled, was held to be a “concealed fraud” within this section (*q*).

What amounts to concealed fraud.

Concealment of the illegitimacy of an eldest son by such son and his parents, from the next (and eldest legitimate) son, is a “concealed fraud” (*r*).

Concealment by an agent, who purchases from his principal at an under-value, amounts to fraud; and such a transaction has been opened upon bill filed, although all matters in dispute between the parties had been previously referred to an arbitrator, and mutual releases had been

Principal and agent.

(*p*) *Petre v. Petre*, 1 Drew. 397.  
Compare *Vane v. Vane*, L. R. 8 Ch. 383.

(*q*) *Sturgis v. Mordaunt*, 24 B. 541.  
(*r*) *Vane v. Vane*, L. R. 8 Ch. 383.

3 & 4 Will. 4, c. 27, executed pursuant to his award (s). A bribe taken by any person in a fiduciary position stands upon the same footing (t).

### § 26.

Convey-  
ance from  
lunatic.

Dulness of  
intellect  
does not  
render an  
open fraud  
"con-  
cealed."

Under-  
ground  
trespass.

Case of  
concealed  
fraud can-  
not be  
raised on  
petition.

The mere fact of obtaining a conveyance from a lunatic who is represented by an independent solicitor is not a fraud, in the absence of *mala fides* or knowledge of the lunacy on the part of the purchaser (u). "But a case of direct and positive fraud, of which the lunacy forms one fact or circumstance, is clearly a subject for equitable interference." *Per* LORD TRURO (x). And *semble* that knowledge on the part of the grantee, of the state of mind of the lunatic, would be sufficient to bring the case within s. 26 (y). But if the alleged fraud is open and palpable, the fact of the person affected thereby being of very dull intellect, though not lunatic, will not induce the Court to hold it to be "concealed fraud," especially where such person acted under the advice of his solicitor (z).

The working by a surface owner, of mines under his land which are reserved to the lord of the manor, without the lord's knowledge, is a concealed fraud within this section (a). Underground working of an adjoining owner's mine is a concealed trespass; but LORD ROMILLY, M.R., thought it did not amount to a concealed fraud, in the absence of proof of direct fraud (b). But this opinion has been questioned by MALINS, V.-C., who said: "For the purpose of the statute the breaking of bounds into your neighbour's colliery must be considered a fraudulent act" (c). And the same view has been taken by HALL, V.-C., (d) and FRY, J., (e) in recent cases. But a distinction has been drawn between an inadvertent and a deliberate trespass (f).

The interest of a fund in court had been paid to the heir-at-law of a former owner of the property which it represented, for fifty years under an order of court. Upon petition for payment out to his representatives, the respondents (the devisees of such former owner) were not allowed to set up a case of fraud in obtaining the order for payment of interest; but leave was given them to file a bill within ten days (g).

In cases of fraud, distinct proof will be required against persons liable to be made answerable for the consequences of it (h). The onus of

(s) *Trevelyan v. Charter*, 11 Cl. & Fin. 714.

(t) *Metropolitan Bank v. Heiron*, 5 Ex. D. 319.

(u) *Price v. Berrington*, 3 M. & G. 486; compare *Molton v. Camroux*, 4 Ex. 17.

(x) 3 M. & G. 498.

(y) *Lewis v. Thomas*, 3 H. 26.

(z) *Manby v. Bewicke*, 3 K. & J. 343.

(a) *Earl of Dartmouth v. Spittle*, 19

W. R. 444.

(b) *Dean v. Thwaite*, 21 B. 621.

(c) *Ecclesiastical Commissioners v. N. E. Ry. Co.*, 4 Ch. D. 845—860.

(d) *Ashton v. Stock*, 25 W. R. 862.

(e) *Williams v. Raggett*, 46 L. J. Ch. 849.

(f) *Trotter v. Maclean*, 13 Ch. D. 574; *Jocry v. Dickinson*, 26 S. J. 109.

(g) *Ex parte Breach*, 12 W. R. 769.

(h) *Dean v. Thwaite*, 21 B. 621—623.

proving both the fraud and the concealment lies upon the person alleging them (i). 3 & 4 Will. 4, c. 27, § 26.

Where it was doubtful whether renewable leaseholds passed by an instrument under which the defendant claimed, but his predecessors in title had entered and obtained renewals for their own benefit, under circumstances which the plaintiff alleged to be fraudulent, sixty-two years before bill filed, the plaintiff was held to be barred, and the case not to come within this section. All the persons who could have explained the circumstances were dead (k). *Laches* disentitles to relief.

A plaintiff, in 1868, set up a title which depended upon a marriage in 1724, and alleged that certain registers were fraudulently mutilated and an index of names gummed up, so that he was unable to ascertain the names of persons married during that year. It was held that the marriage might have been proved with reasonable diligence before 1868, and a demurrer was allowed (l). What amounts to "reasonable diligence."

Plaintiffs alleged in 1880 that on the death intestate of X. in 1799 defendant's predecessor in title took possession of real estate as heir-at-law of X., fraudulently concealing the fact that he was illegitimate. Held, that the plaintiffs could have ascertained the facts earlier by reasonable diligence, and were, therefore, barred (m).

Disputed boundaries between two adjoining collieries were settled by mutual agreement in 1862, and releases in respect of prior wrongful workings given in 1864. Notwithstanding this, the defendants continued to get coal by underground workings from the plaintiffs' mines during 1863 and 1864; and upon discovering such workings in 1870, the plaintiffs filed a bill for an account. MALINS, V.-C., held that though they had made no inquiry, they had used reasonable diligence. He said: "Are you bound to make inquiry of your neighbour whether he has robbed you or not? If you have a neighbour, and treat him as a respectable person who would not do so improper an act, I cannot conceive that there can be any necessity on the part of the plaintiffs to make the inquiry, *Have you violated these boundaries which we settled in 1862? Did you, in 1863, in defiance of all that, break the bounds, and carry away one hundred thousand tons of coal, and break our boundary so as to expose us to inundations from your colliery? I cannot conceive that reasonable diligence required it*" (n).

In the same case, the Vice-Chancellor disapproved of the rule laid down by LORD ROMILLY, M.R., that in the absence of proof to the con-

(i) *Rains v. Buxton*, 14 Ch. D. 587.

(k) *Petre v. Petre*, 1 Drew. 371.

(l) *Chetham v. Hoare*, L. R. 9 Eq. 571. See also *Sturgis v. Morse*, 21 B. 541—546.

(m) *Willis v. Earl Howe*, 50 L. J.

Ch. 4.

(n) *Ecclesiastical Commissioners v. N. E. Ry. Co.*, 4 Ch. D. 845—861—2; See also *Ashton v. Stock*, 25 W. R. 862; and *Williams v. Raggett*, 46 L. J. Ch. 849.

3 & 4 Will.  
4, c. 27,  
§ 26.

trary the Court would assume the whole of the working to have taken place within six years (and so to fall within s. 42), but that the defendant might escape liability by proving that the whole of the coal had, in fact, been got more than six years before bill filed (o). MALINS, V.-C., remarked, "This is too broad in my opinion. If it was taken away more than six years ago and the plaintiff knew that, or had the means of knowing it, then it is very reasonable that the statute should be applied; but, according to this, although in the case I have suggested, a man may have an estate which he believes to be untouched, his neighbour may have robbed him more than six years ago, but he does not find him out, according to this decision he may rob him successfully, because the *Statute of Limitations* does not apply. That, in my opinion, lays down the rule far too broadly. If Lord Romilly meant to say, *Let him prove that it was done more than six years (ago?) and the plaintiff knew it*, then it is in accordance with all the other decisions, and with my view of the case" (p).

And when a bill filed to established the plaintiff's title as *heir-at-law* to certain estates of which his elder brother B. and B.'s heir had been in possession for forty years, alleged that the fact of B.'s illegitimacy had been concealed from the plaintiff by their parents, and B., a demurrer was overruled on the ground that the plaintiff had used reasonable diligence (q).

Meaning  
of "*bond  
fide* pur-  
chaser."

<sup>3</sup> In the same case it was doubted whether the defence of being a *bond fide* purchaser for value could be raised by demurrer (s); and the meaning of the words from "*bond fide* purchaser" to the end of the section was fully discussed by JAMES, L. J., who came to the conclusion "that it was meant that the purchaser should be really a purchaser, and not merely a donee taking a gift under the form of a purchase."

Fraud of  
agent im-  
puted to  
principal.

<sup>4</sup> The Court was also of opinion that the concluding words of the section were not intended to make actual personal fraud necessary to deprive a purchaser of the benefit of the exception; but that the section ought to be read as if it had concluded thus:—"who did not know, and had no reason to believe, either by himself or by some agent whose knowledge or reason to believe is by settled law taken to be his, that any such fraud had been committed" (t).

Under-  
ground  
trespass—

<sup>5</sup> In cases of mistake time runs from the discovery of the mistake (u).

In cases of underground trespass into an adjoining owner's coal mine, the measure of damages is the actual value at the pit's mouth of the

(o) *Dean v. Thwaite*, 21 B. 621.  
(p) 4 Ch. D. 864. Compare *Ash-  
ton v. Stock*, 25 W. R. 862; *Williams  
v. Raggett*, 46 L. J. Ch. 849; *Trotter  
v. Maclean*, 13 Ch. D. 574; *Joicey v.  
Dickinson*, 26 S. J. 109.

(q) *Vane v. Vane*, L. R. 8 Ch.  
388.  
(s) L. R. 8 Ch. 388.  
(t) *Ibid.* 400.  
(u) *Brooksbank v. Smith*, 2 Y. & C.  
58.



coal wrongfully abstracted, after deducting, in the case of accidental trespass, the cost of severance and bringing to bank, and in the case of deliberate trespass, the cost of bringing to bank only (x). And the trespasser has been made to pay damages in respect of coal which his wrongful acts have made unworkable (y).

3 & 4 Will.  
4, c. 27,  
§ 26.  
measure of  
damages.

## ACQUIESCENCE.

27. Provided always, and be it further enacted, that nothing in this Act contained shall be deemed to interfere with any rule or jurisdiction of Courts of Equity in refusing relief on the ground of acquiescence<sup>1</sup> or otherwise to any person<sup>2</sup> whose right to bring a suit may not be barred by virtue of this Act.

3 & 4 Will.  
4, c. 27,  
§ 27.

Statute  
not to  
affect  
equitable  
rules as to  
acquies-  
cence.

<sup>1</sup> "If a party having a right stands by and sees another dealing with the property in a manner inconsistent with that right, and makes no objection while the act is in progress, he cannot afterwards complain." *Per* LORD COTTENHAM, C. (z). Acquiescence cannot be imputed to a minor (a) unless he is one of several plaintiffs; and then *semble* he may be bound by the acquiescence of a co-plaintiff who is *sui juris*. *Per* TURNER, V.-C. (b); who also said, in the same case, "Parties cannot, I think, be said to acquiesce in the claims of others, unless they are fully cognizant of their rights to dispute them" (c).

Effect of  
this sec-  
tion.

Acquies-  
cence of  
infants.

The distinction between acquiescence and *laches* was thus laid down by LORD CRANWORTH, C. :—"So far as *laches* is a defence, I take it that where there is a Statute of Limitations, the objection of simple *laches* does not apply until the expiration of the time allowed by the statute. But acquiescence is a different thing; it means more than *laches*. . . . But the fact of simply neglecting to enforce a claim for the period during which the law permits him to delay, without losing his right, I conceive cannot be an equitable bar (d).

Acqui-  
escence  
and *laches*  
distin-  
guished.

"Acquiescence, as I conceive, imports knowledge . . . and in cases of this sort I think that acquiescence imports full knowledge, for

Acqui-  
escence  
imports

(x) *Ecclesiastical Commissioners v. N. E. Ry. Co.*, 4 Ch. D. 845; *Ashton v. Stock*, 25 W. R. 862; *Joicey v. Dickinson*, 26 S. J. 109.

(y) *Williams v. Raggett*, 46 L. J. Ch. 849.

(z) *Duke of Leeds v. Earl of Amherst*, 2 Phil. 123.

(a) *Ibid.*

(b) *Marker v. Marker*, 9 H. 11—15. But compare *March v. Russell*, 3 M. & C. 31.

(c) *Ibid.*, p. 16.

(d) *Archbold v. Scully*, 9 H. L. C. 360—383. Compare *Petre v. Petra*, cited under s. 26, *ante*, pp. 61 and 63.



3 & 4 Will. 4, c. 27, § 27. I take the rule to be quite settled that a *cestui que trust* cannot be bound by acquiescence unless he has been fully informed of his rights, and of all the material facts and circumstances of the case." *Per* TURNER,

full knowledge.

L. J. (e). As to whether an equitable remainderman is bound by acquiescence and the onus of proof when acquiescence is set up by a trustee against his *cestui que trust*, see *Ibid.*, pp. 73 and 77. A bill, in 1846, to set aside a sale of a reversionary interest at an alleged undervalue in 1822 was dismissed with costs on the ground of delay; the tenant for life having been dead sixteen years and the purchaser more than twenty years (f).

Where a widow, who was entitled to a legacy and annuity, lived twenty-eight years and might have enforced payment of them, a bill by her executrix to enforce such payment was dismissed with costs, no evidence of any payment or explanation of non-payment being given (g).

A residuary legatee who knew of his testator's will was held to be barred by twenty-three years' acquiescence (h).

Beneficiaries under a will, who had acquiesced for twelve years in an investment which they alleged to be a breach of trust, were held disentitled to relief. Their testator had been dead nearly fifty-three years (i).

Acquiescence applies even between trustees and *cestui que trust*.

Although time does not run as between trustee and *cestui que trust*, the general rule of equity that encouragement should not be given to stale demands is equally applicable (k).

Where annuities were charged upon an estate which became unprofitable, and yielded no income for nearly thirty years, it was held that the annuitants were entitled to arrears of their annuities out of the first funds received, when the estate again became profitable; and that they were not guilty of *laches* in not taking proceedings during the time in which no payments could have been made to them (l).

It has not been thought necessary to state the effect of numerous old cases upon the question of acquiescence, which may, however, be referred to (m).

(e) *Life Association of Scotland v. Siddal*, 3 D. F. & J. 58—74.

(f) *Sibbering v. Earl of Balcarras*, 3 De G. & S. 737. Compare *Spackman v. Evans*, L. R. 3 H. L. 171—221; *Petre v. Petre*, ante, pp. 61 and 63.

(g) *Pattison v. Hawkeworth*, 10 B. 375.

(h) *Portlock v. Gardner*, 11 L. J. N. S. (Ch.) 313.

(i) *Browne v. Cross*, 14 B. 105.

(k) *M'Donnell v. White*, 11 H. L.

C. 570—579; *Thompson v. Eastwood*, 2 Ap. Ca. 215. Compare *Green's case*, L. R. 18 Eq. 428—432. And see now 36 & 37 Vict. c. 66, s. 25 (2).

(l) *Pitt v. Lord Dacre*, 3 Ch. D. 295—299.

(m) *Svanton v. Raven*, 3 Atk. 104; *Newton v. Ayscough*, 19 Ves. 534; *Selsey v. Rhodes*, 1 Bli. N. R. 1; *Hicks v. Cooke*, 4 Dow. 17; *Tucker v. Tucker*, 13 Price 119; *Gray v. Chaplin*, 2 Russ. 126.

## MORTGAGEES IN POSSESSION.

**28.**<sup>1</sup> *Repealed by s. 9 and replaced by s. 7 of the R. P. L. A., 3 & 4 Will. 1874, as from the 1st of January, 1879. Sect. 7 of the last mentioned Act is as follows:—*

4, c. 27,  
§ 28.

[7.<sup>3</sup> When a mortgagee shall have obtained the possession or receipt of the profits of any land or the receipt of any rent comprised in his mortgage,<sup>4</sup> the mortgagor, or any person claiming through him,<sup>5</sup> shall not bring any action or suit to redeem the mortgage but within twelve<sup>2</sup> years<sup>6</sup> next after the time at which the mortgagee<sup>8</sup> obtained such possession or receipt,<sup>7</sup> unless in the meantime an acknowledgment<sup>9</sup> in writing of the title of the mortgagor, or of his right to redemption, shall have been given to the mortgagor or some person claiming his estate or to the agent<sup>10</sup> of such mortgagor or person, signed by the mortgagee or the person claiming through him; and in such case no such action or suit shall be brought but within twelve<sup>2</sup> years next after the time at which such acknowledgment, or the last of such acknowledgments, if more than one, was given; and when there shall be more than one mortgagor, or more than one person claiming through the mortgagor or mortgagors, such acknowledgment, if given to any of such mortgagors or persons, or his or their agent, shall be as effectual as if the same had been given to all such mortgagors or persons; but where there shall be more than one mortgagee, or more than one person claiming the estate or interest of the mortgagee or mortgagees, such acknowledgment, signed by one or more of such mortgagees or persons, shall be effectual only as against the party or parties signing as aforesaid, and the person or persons claiming any part of the mortgage money, or land, or rent by, from, or under him or them, and any person or persons entitled to any estate or estates, interest or interests, to take effect after or in defeasance of his or their estate or estates, interest or interests, and

37 & 38  
Vict. c. 57,  
§ 7.

Time runs in favour of a mortgagee in possession from the time he takes possession, or from any acknowledgment he may make of the mortgagor's title.

Time of limitation twelve years.

3 & 4 Will.  
4, c. 27,  
**§ 28.**  
37 & 38  
Vict. c. 57,  
**§ 7.**

Proviso for  
case of ac-  
knowledg-  
ment by  
one of  
several  
mortga-  
gees in  
possession.

shall not operate to give to the mortgagor or mortgagors a right to redeem the mortgage as against the person or persons entitled to any other undivided or divided part of the money, or land, or rent; and where such of the mortgagees or persons aforesaid as shall have given such acknowledgment shall be entitled to a divided part of the land or rent comprised in the mortgage, or some estate or interest therein, and not to any ascertained part of the mortgage money,<sup>11</sup> the mortgagor or mortgagors shall be entitled to redeem the same divided part of the land or rent, on payment, with interest, of the part of the mortgage money which shall bear the same proportion to the whole of the mortgage money as the value of such divided part of the land or rent shall bear to the value of the whole of the land or rent comprised in the mortgage.<sup>12]</sup>

Effect of  
new enact-  
ment.

<sup>2</sup> Sect. 7 of the Act of 1874 merely substitutes "twelve years" for "twenty years," and corrects one or two verbal inaccuracies in the older enactment; so the cases decided upon the construction of 3 & 4 Will. 4, c. 27, s. 28, will still be useful.

Retro-  
spective.

<sup>3</sup> This section is retrospective. When a mortgagee had been in possession seventeen years before the passing of the Act, it was held that the mortgagor had only three years afterwards within which to take proceedings (n).

<sup>4</sup> But where a mortgagee, who had received no interest or acknowledgment since 1812, and did not even know of his rights, was brought before the Court in 1837 as a defendant to a bill filed in 1833 by a subsequent incumbrancer, it was held that he was not barred by the statute (o).

<sup>5</sup> A mortgage by way of trust for sale is within this section, and not s. 25 (p), and the trust is extinct at the end of the twelve years (q).

*Quære* whether a sale, with a conditional right of re-purchase at the same price, is a mortgage within this section (r).

Express  
agreement  
may ex-  
clude this  
section.

<sup>6</sup> "I am disposed to think that the statute cannot apply, so as to make the mere possession by the mortgagee for twenty years without

(n) *Batchelor v. Middleton*, 6 H. 75.

(o) *Murphy v. Stone*, 1 Dr. & Wal. 236.

(p) *Law v. Bagwell*, 4 Dr. & War. 398; *Locking v. Parker*, L. R. 8 Ch. 30; *Yardley v. Nolland*, L. R. 20 Eq.

428; *Re Alison, Johnson v. Mounsey*, 11 Ch. D. 284.

(q) *Chapman v. Corpe*, 27 W. R. 781. Compare *Banner v. Berridge*, 18 Ch. D. 254.

(r) *Alderson v. White*, 2 De G. & J. 97.

acknowledgment a bar to redemption, *where the original contract is in terms that the mortgagor may redeem at any time during a period extending beyond the twenty years*; but that does not dispose of the question whether the statute would not bar any such right as is claimed here to redeem on terms different from those expressed in the deed." *Per LORD CRANWORTH, C. (s).*

3 & 4 Will.  
4, c. 27,  
§ 28.  
37 & 38  
Vict. c. 57,  
§ 7.

<sup>7</sup> In the absence of any such special agreement, however, time runs against a mortgagor from the moment a mortgagee takes possession *quod* mortgagee; and he will be barred in twenty [or twelve] years, without any saving for disabilities, unless some admission of his title is made by the mortgagee (*t*).

When time  
begins to  
run.

If a mortgagee has been in undisturbed possession of any part of the land comprised in his mortgage for the statutory period, the right of the mortgagor to redeem that part is barred, though he may redeem any part that the mortgagee has not been so in possession of (*u*).

The mortgagor is absolutely barred at the end of the twelve years, as the savings for disability do not apply as between mortgagor and mortgagee (*x*).

<sup>8</sup> If, however, he enters in some other character than that of mortgagee (*e.g.*, as purchaser of the equity of redemption) the rule does not apply, but he holds under the title of his vendor (*y*). And if a mortgagee in possession purchases the interest of the tenant for life in the equity of redemption, time will not run against the remaindermen (*z*). And the same rule applies where a mortgagee becomes tenant for life or tenant in common of the equity of redemption otherwise than by purchase (*a*).

Where a person who originally entered as agent to the mortgagor took a transfer of the mortgage shortly after the bankruptcy of the mortgagor and remained in possession twenty-eight years, the mortgagor was held to be barred (*b*).

Where a person entered into possession under an agreement to purchase a mortgaged estate, and actually paid off the mortgages, the mortgagor on filing a bill for redemption nearly fifty years afterwards was held to be barred (*c*). Where a bill for redemption, filed twenty-five years after the date of the mortgage, stated that the mortgagee

(*s*) *Alderson v. White*, 2 De G. & J. 97—109.

(*t*) *Raffety v. King*, 1 Keen, 601—616.

(*u*) *Kinsman v. Rouse*, 17 Ch. D. 104.

(*x*) *Ibid.*; *Forster v. Patterson*, 17 Ch. D. 132.

(*y*) *Raffety v. King*, 1 Keen, 610—617. Compare *Browne v. Bishop of*

*Cork*, 1 Dr. & Wal. 714—715.

(*z*) *Hyde v. Dallaway*, 2 H. 528.

(*a*) *Wynne v. Styant*, 1 Phil. 303—306.

(*b*) *Markwick v. Hardingham*, 15 Ch. D. 339.

(*c*) *Browne v. Bishop of Cork*, 1 Dr. & Wal. 700. Compare *Ward v. Cartlar*, cited under s. 3, *ante*, p. 12.

3 & 4 Will. 4, c. 27, § 28. 37 & 38. entered into possession "*shortly after*" the date of the mortgage, the Court would not presume, upon demurrer, that he had been in possession twenty years (*d*).

Vict. c. 57, § 7. The statute was held to be no bar to a mortgagor's right to recover damages for coal which the mortgagee had allowed trespassers to abstract from under the mortgaged property (*e*).

Waste by mortgagee's permission.

What amounts to acknowledgment by mortgagee.

Letter containing acknowledgment.

• Of course if a mortgagee in possession makes any acknowledgment of the mortgagor's title, time will begin to run against the latter from such acknowledgment. As to what constitutes an acknowledgment reference may be made to the cases cited under s. 14 (*f*), s. 40 (*g*), and s. 42 (*h*), as well as to the following cases under this section.

*Quære* whether the fact of an account being kept by a mortgagor in possession amounts to an acknowledgment under this section (*i*).

The following letter from a mortgagee in possession to the grandfather of the infant heiress of the mortgagor was held a sufficient acknowledgment:—

"Concerning the business at Hendred [the name of the mortgaged property], which you know nearly as well as myself, as there has been nothing kept from you, which I am very willing to settle if your grand-daughter is of age. I never told you any otherways; as I have been informed she is the heiress of what there is. As for Chancery, I think there is no good there. The difference is not worth much. I shall hear from your grand-daughter about the business." The bill was filed nearly seventeen years after the date of the letter (*k*).

A mortgagee who had been in possession more than twenty years wrote to the mortgagor's solicitor: "I do not see the use of a meeting either here or at Manchester, unless some party is ready with the money to pay me off." Held that this was a sufficient acknowledgment of the mortgagor's title (*l*).

Letter not amounting to acknowledgment.

Acknowledgment to stranger. Acknowledgment to person acting as agent.

A letter containing the words "I deny the claim of your client," written by a mortgagee to the solicitor of a subsequent incumbrancer, in reply to a demand for an account, was held not to amount to acknowledgment (*m*).

<sup>10</sup> The acknowledgment may be made to the mortgagor or his agent. An acknowledgment to a third person, *e.g.*, by the transfer of the mortgage (*n*), is not sufficient. "It is not necessary to make a person an agent, that he should have an actual authority to act. The question

(*d*) *Baker v. Wetton*, 14 Sim. 426.

(*e*) *Hood v. Easton*, 2 Giff. 692.

(*f*) *Ante*, p. 37.

(*g*) *Post*, p. 87.

(*h*) *Post*, p. 96.

(*i*) *Baker v. Wetton*, 14 Sim. 426.

(*k*) *Trulock v. Robey*, 12 Sim.

402.

(*l*) *Stansfield v. Hobson*, 3 D. M. & G. 620—623—626.

(*m*) *Thompson v. Bowyer*, 11 W. R. 975.

(*n*) *Batchelor v. Middleton*, 6 H. 75—84.

is whether the party who wrote the letter did not treat the party to whom it was written as the agent." *Per* SHADWELL, V.-C. (o).

<sup>11</sup> These words "are directed to the case of several mortgagees, where an account taken against one will bind his interest, but not the interest of any other person. But when the mortgage is to secure money to two or more persons jointly, there must be an acknowledgment by all." *Per* MALINS, V.-C. (p).

"It appears to me, therefore, to be the best construction of this involved and difficult section, to hold that the provisions as to acknowledgment by some of several mortgagees apply, only, where they have separate interests either in the money or the land." *Per* MELLISH, L. J. (q).

<sup>12</sup> Accordingly it was held that where two mortgagees advance money upon a joint account, and remain in possession more than twenty [or now twelve] years, an acknowledgment by one of them only is totally inoperative: but JAMES, L. J., expressly said, "Our decision is confined to the case of mortgagees who are trustees, and are shown to be such on the face of the deed" (r).

Now it is quite possible that joint mortgagees, who are not trustees (*e.g.*, partners), might be in possession; and the case of an acknowledgment by one of their number is not provided for by the Act, and does not come within the above decision. It is unfortunate that "this involved and difficult section" has been re-enacted as s. 7 of the Act of 1874, without providing for such a case, in spite of the following remarks of MELLISH, L. J.: "If the attention of the framers of the Act had been called to this point, I think they would either have provided that an acknowledgment by one should bind both, which would have been very reasonable, or that an acknowledgment by both should be necessary, and an acknowledgment by one wholly ineffectual" (s).

As regards the first alternative suggested by the Lord Justice, it may be remarked that the tendency of all recent legislation on the subject, has been to reduce the periods of limitation; and to enable a title by mere possession to be more easily acquired. And in the case of trustees, it may have been considered unwise to allow a *certain que* trust to be prejudiced by the act of one only of his trustees. Perhaps, also, the above decision was considered to have sufficiently settled the law. But as that decision was expressly limited to the case of trustees, it is difficult to see why some provision should not have been made for other joint mortgagees in possession. The most satisfactory solution

(o) *Trulock v. Robey*, 12 Sim. 402—404.

(p) *Richardson v. Young*, L. R. 10 Eq. 280.

(q) *Richardson v. Young*, L. R. 6

Ch. 481.

(r) *Richardson v. Young*, L. R. 10 Eq. 275; L. R. 6 Ch. 478.

(s) *Ibid.*, p. 480.

3 & 4 Will.  
4, c. 27,  
§ 28.  
37 & 38  
Vict. c. 57,  
§ 7.  
Effect of  
proviso as  
to acknow-  
ledgment  
by one of  
several  
mortgagees in  
possession.

3 & 4 Will. of the difficulty might have been to enact that an acknowledgment  
 4, c. 27, by one of such joint mortgagees should be binding upon him, if he  
 § 28. became the survivor within twelve years; but should otherwise be  
 37 & 38 wholly ineffectual.  
 Vict. c. 57,  
 § 7.

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#### CORPORATIONS SOLE.

3 & 4 Will. **29.** Provided always, and be it further enacted, that it  
 4, c. 27, shall be lawful for any archbishop, bishop, dean, prebendary,  
 § 29. parson, vicar, master of hospital, or other spiritual or eleemo-  
 Spiritual and eleemo- synary corporation sole, to make an entry or distress, or to  
 synary corpora- bring an action or suit to recover any land or rent<sup>1</sup> within  
 tion sole to such period as hereinafter is mentioned next after the time  
 be barred in sixty at which the right of such corporation sole, or of his prede-  
 years, or cessor, to make such entry or distress or bring such action or  
 two incum- suit shall first have accrued; (that is to say,) the period  
 bencies and six during which two persons in succession shall have held the  
 years. office or benefice in respect whereof such land or rent shall be  
 claimed, and six years after a third person shall have been  
 appointed thereto, if the times of such two incumbencies  
 and such term of six years taken together shall amount to the  
 full period of sixty years; and if such times taken together  
 shall not amount to the full period of sixty years, then during  
 such further number of years in addition to such six years as  
 will with the time of the holding of such two persons and  
 such six years make up the full period of sixty years;<sup>2</sup> and  
 after the said thirty-first day of December, one thousand  
 eight hundred and thirty-three, no such entry, distress, action,  
 or suit shall be made or brought at any time beyond the  
 determination of such period.<sup>3</sup>

This is an  
 exception  
 from s. 2.

<sup>1</sup> This section applies to "land or rent" only.

<sup>2</sup> Its practical effect is to except every spiritual or eleemosynary corporation sole from the provisions relating to private owners. Instead of being barred in twenty [or twelve] years, he will only be barred by adverse possession for (a) sixty years, or (b) two incumbencies and six years, whichever is the longest.

<sup>3</sup> A. sold to B. certain lands which, together with other lands, were subject to a chief rent payable to an archbishop. A. covenanted to



indemnify B. against the rent, and paid it from 1766 till 1822. On bill 8 & 4 Will. 4, c. 27, § 29. filed by the archbishop in 1849, it was held that the payment of rent by A. prevented the statute from running in favour of the land sold to B. The archbishop's right of entry under a. 3 was held to accrue, *quod* all the land, when the last payment of rent was made (t).

Land annexed to a deanery became vested in the Ecclesiastical Commissioners, and time was then running against the dean. It was held (LORD BLACKBURN *diss.*) that the Commissioners had the same time within which to bring an action as the dean would have had (u).

#### ADVOWSONS.

30.<sup>1</sup> And be it further enacted, that after the said thirty- 3 & 4 Will. 4, c. 27, § 30. first day of December, one thousand eight hundred and thirty-three, no person shall bring any *quare impedit* or other action, or any suit, to enforce a right to present to or bestow any church, vicarage, or other ecclesiastical benefice, as the patron thereof, after the expiration of such period as hereinafter is mentioned; (that is to say,) the period during which three clerks in succession shall have held the same, all of whom shall have obtained possession thereof adversely to the right of presentation or gift of such person, or of some person through whom he claims, if the times of such incumbencies taken together shall amount to the full period of sixty years; and if the times of such incumbencies shall not together amount to the full period of sixty years, then after the expiration of such further time as, with the times of such incumbencies, will make up the full period of sixty years.

Owner of advowson to be barred by three adverse presentations or sixty years' adverse possession.

<sup>1</sup> Sect. 29 applies to property belonging to a benefice or other office filled by an individual; this section applies to the benefice or advowson itself, and governs the rights, not of the holder, but of the patron. Distinction between ss. 29 & 30.

(t) *Archbishop of Dublin v. Lord Trimleston*, 12 I. Eq. R. 251—265. Compare *Woodcock v. Titterton*, 12 W. R. 864; and *Chinnery v. Evans*,

p. 17, *ante*.

(u) *Ecclesiastical Commissioners v. Rowe*, 5 Ap. Ca. 736.



The following explanatory enactment speaks for itself:—

BISHOPS BARRED AS OTHER PATRONS.

6 & 7 Vict.  
c. 54,  
§ 3.

Bishops to  
be barred  
at the same  
periods as  
other  
patrons.

[3. And whereas doubts have been entertained whether the several periods by the said Act<sup>1</sup> limited for bringing any *quare impedit* or other action, or any suit to enforce a right to present to or bestow any ecclesiastical benefice as the patron thereof, apply to the case of a bishop claiming to have right to collate to or bestow any ecclesiastical benefice in his diocese; and it is expedient that all such doubts should be removed: be it therefore enacted, that the several periods limited by the said Act or by this Act for bringing any *quare impedit* or other action, or any suit to enforce a right to present to or bestow any ecclesiastical benefice, shall apply to the case of any bishop claiming a right as patron to collate to or bestow any ecclesiastical benefice, and that such right shall be extinguished in the same manner and at the same periods as the right of any other patron to present to or bestow any ecclesiastical benefice: provided always, that nothing herein contained shall be deemed to affect the right of any bishop to collate to any ecclesiastical benefice by reason of lapse.]

<sup>1</sup> 3 & 4 Will. 4, c. 27.

3 & 4 Will.  
4, c. 27,  
§ 31.

In what  
cases a  
clerk pre-  
sented by  
the Crown  
or ordinary  
shall be  
deemed to  
hold ad-  
versely to  
the patron.

31. Provided always, and be it further enacted, that when on the avoidance, after a clerk shall have obtained possession of an ecclesiastical benefice adversely to the right of presentation or gift of the patron thereof, a clerk shall be presented or collated thereto by His Majesty or the ordinary by reason of a lapse, such last-mentioned clerk shall be deemed to have obtained possession adversely to the right of presentation or gift of such patron as aforesaid; but when a clerk shall have been presented by His Majesty upon the avoidance of a benefice in consequence of the incumbent thereof having been made a bishop, the incumbency of such clerk shall, for the purposes of this Act, be deemed a continuation of the incumbency of the clerk so made bishop.

**32.**<sup>1</sup> And be it further enacted, that in the construction of this Act every person claiming a right to present to or bestow any ecclesiastical benefice, as patron thereof, by virtue of any estate, interest, or right which the owner of an estate tail in the advowson might have barred, shall be deemed to be a person claiming through the person entitled to such estate tail, and the right to bring any *quare impedit*, action, or suit shall be limited accordingly.

3 & 4 Will.  
4, c. 27,  
§ 32.  
Provide as  
to tenants  
in tail of  
advow-  
sons.

<sup>1</sup> See the provisions and cases relating to tenants in tail of land or rent (x).

**33.** Provided always, and be it further enacted, that after the said thirty-first day of December, one thousand eight hundred and thirty-three, no person shall bring any *quare impedit* or other action, or any suit to enforce a right to present to or bestow any ecclesiastical benefice, as the patron thereof, after the expiration of one hundred years from the time at which a clerk shall have obtained possession of such benefice adversely to the right of presentation or gift of such person, or of some person through whom he claims, or of some person entitled to some preceding estate or interest, or undivided share, or alternate right of presentation or gift, held or derived under the same title, unless a clerk shall subsequently have obtained possession of such benefice on the presentation or gift of the person so claiming, or of some person through whom he claims, or of some other person entitled in respect of an estate, share, or right held or derived under the same title.

3 & 4 Will.  
4, c. 27,  
§ 33.  
Extreme  
period of  
limitation  
as regards  
advowsons  
fixed at  
one hun-  
dred years.

#### EXTINCTION OF TITLE.

**34.** And be it further enacted, that at the determination of the period limited by this Act to any person for making an entry or distress, or bringing any writ of *quare impedit* or other action or suit, the right and title of such person to the land, rent, or advowson for the recovery whereof such entry,

3 & 4 Will.  
4, c. 27,  
§ 34.  
Title of  
person  
against  
whom full

(x) Sects. 21—23, *ante*, pp. 47—50.

3 & 4 Will. 4, c. 27, § 34. distress, action, or suit respectively might have been made or brought within such period, shall be extinguished.

time has run to be extinguished. Effect of s. 34. It bars right as well as remedy.

Possession now raises a presumption of title.

“The former statutes only barred the remedy, but did not touch the right; possession at all times gave a certain right; but under the new Act (y), when the remedy is barred, the right and title of the real owner are extinguished, and are, in effect, transferred to the person whose possession is a bar.” *Per* LORD ST. LEONARDS, when Lord Chancellor of Ireland (z).

Possession for the statutory period raises a presumption of title. Where the plaintiff in ejectment showed twenty-three years' possession and the defendant only ten years', judgment was given for the plaintiff (a). This was before the passing of 3 & 4 Will. 4, c. 27; and in a subsequent case, *PATTERSON, J.*, said: “The effect of the 34th section would probably be to give the right to the possessor for twenty years [or twelve years] even against the party in whom the legal estate formerly was, and, but for the Act, would still be, where he had not obtained the possession till after the twenty [or twelve] years; but then we apprehend, as before stated, that such twenty [or twelve] years' possession must be either by the same person or several persons claiming one from the other.” In fact, to quote the words of *PARKE, B.* (b), “The effect of the Act is to make a parliamentary conveyance of the land to the person in possession after that period has elapsed.” The soundness of this view is questioned by *Mr. Dart* (c).

Where a mortgagor remains in possession for thirteen years after paying off his mortgagee, the legal estate reverts in him without reconveyance (d).

Barred title how revived.

Under the Real Property Limitation Act, 1874, the same effect is now produced in twelve years (e). After the title is extinguished by the statute, it cannot be revived by re-entry (f) or by acknowledgment (g). But it may be revived as between landlord and tenant by payment of rent (h), and if a person in possession is proved to have made recent payments of rent to an adverse claimant, a very strong presumption is raised that rent had been previously paid. But it appears that if this presumption were rebutted by evidence of non-payment during a previous period of twenty [or twelve] years, the claimant would be barred

(y) 3 & 4 Will. 4, c. 27.

(z) 1 Dr. & War. 289—290.

(a) *Harding v. Cooke*, 7 Bing. 346.

(b) *Jukes v. Sumner*, 14 M. & W. 39—42.

(c) V. & P., 5th ed., p. 402. But see *Bolling v. Hobday*, 31 W. R. 9.

(d) *Sands to Thompson*, 22 Ch. D. 614.

(e) See also *Burroughs v. M'Creight*, 1 Jo. & La. T. 290, and *Day v. Day*, L. R. 3 P. C. 751.

(f) *Brassington v. Llewellyn*, 1 F. & F. 27; 27 L. J. Ex. 297.

(g) *Re Alison*, 11 Ch. D. 284; *Sanders v. Sanders*, 19 Ch. D. 373.

(h) *Bunting v. Sargent*, 13 Ch. D. 330.

and the subsequent payment would not revive the title. The title in *Bunting v. Sargent* and *Sanders v. Sanders* should be carefully compared. § 34

As before stated (k), the possession of a receiver does not prevent the statute from running in favour of a party to the suit. And it would seem that mere possession is *prima facie* evidence of title against a plaintiff unless he can himself show a better title, and also against a defendant who is a mere trespasser.

*Semble* that, at law, the continuous possession of successive independent trespassers for periods amounting in the aggregate to twenty [or, now, twelve] years was sufficient to extinguish the title of the former owner (n); but no one of such trespassers who has been in possession less than twelve years can take advantage of the possession of another by adding it to his own so as to make up the statutory period.

Where trustees and their *certaini que trustant* had been out of possession for more than twenty years, and several trespassers had held for successive periods, each of less than twenty years, LORD ROMILLY, M. R., held, upon bills filed by the trustees and the heir of one of the trespassers, that the heir at law of the true owner was entitled to possession, and made a decree accordingly. At the same time he said, "At law no doubt the person possessed of the legal estate would obtain possession, or if the legal estate could not be shown to be in anyone, the last possessor—that is, the person actually in possession—would hold the property; but not by reason of the validity of his own title, but by reason of the infirmity of the title of the claimants" (p).

This opinion was disapproved of by COCKBURN, C. J., in a subsequent case (q), where it appears to have been stated by mistake in argument, that Lord Romilly's decision was in accordance with his opinion upon the legal point: and it is a curious coincidence that both Mr. Dart and Mr. Banning (r) represent the decision in *Dixon v. Gayfer* as having decreed possession to the last occupier. They appear to have relied upon the erroneous statement of that decision as reported in *Asher v. Whitlock* (s); but a careful perusal of the principal case shows that Lord Romilly expressly drew a distinction between law and equity, and held that "the statute which imposes a bar against the institution of a suit after twenty years to recover possession does not impose any bar

(i) *Sanders v. Sanders*, 19 Ch. D. 373.

(k) Sect. 24, p. 51, ante.

(l) *Groome v. Blake*, 8 L. C. L. R. 428. See also cases cited at p. 51, ante.

(m) *Humphrey v. Martin*, C. & M. 32; *Hughes v. Dyball*, 3 C. & P. 610; *Asher v. Whitlock*, L. R. 1 Q. B. 1—5. But see *Carter v. Bernard*, 13 Q. B. 945.

(n) *Dixon v. Gayfer*, 17 B. 421.

(o) *Carter v. Bernard*, 13 Q. B. 945—952.

(p) *Dixon v. Gayfer*, 17 B. 421—431. Compare *Ex parte Winder*, 6 Ch. D. 696.

(q) *Asher v. Whitlock*, L. R. 1 Q. B. 1—4.

(r) V. & P., 5th ed., 403; Ban. Lim., 106.

(s) L. R. 1 Q. B. 4.

3 & 4 Will. 4, c. 27, § 34. upon the Court's declaring who is entitled to an estate which is in the possession of the Court itself" (t). He also said, "I am of opinion, therefore, that in the circumstances of this case, which are very peculiar, *the Statute of Limitations, having conferred no right, does not apply*, and that this Court must ascertain and declare the rights of the parties exactly in the same manner as if that statute did not exist (u).

But where several successive trespassers, each claiming under his predecessor, have been in possession for periods amounting to twenty [or twelve] years, the last acquires title (x).

Mere possession is a valuable interest.

Possessory title forced on a purchaser.

Mere possession gives an interest which may be devised by will (y), or descends to the heir of the possessor, if he dies intestate (z). The Court will force a title, depending upon possession under the statute, upon a purchaser, although the fact of such possession rests only upon affidavit evidence (a), and though the possession has been against the rights of the Crown (b).

Money in Court under the Lands Clauses Consolidation Act will be paid out to a person who has acquired title under the Statutes of Limitation (c).

A purchaser of a fee-farm rent under conditions provided that no objection should be taken to the title in consequence of the non-payment or non-receipt thereof, discovered that it had not been paid for twenty years. He was held bound to complete, as he had purchased only the chance of getting the rent; and the Court declined to decide whether the rent was extinguished by this section (d). There can be little doubt that such would now be decided to be its effect. See the remarks of LORD ST. LEONARDS upon this case (e). The defence of the statute may be raised by demurrer if the statement of claim shows that the period of limitation has expired (f).

#### RECEIPT OF RENT.

3 & 4 Will. 4, c. 27, § 35. Receipt of 35. And be it further enacted, that the receipt of the rent payable by any tenant from year to year, or other lessee, shall, as against such lessee or any person claiming under him

(t) 17 B., p. 431.

(u) *Ibid.*, p. 432.

(x) *Keefe v. Kirby*, 6 I. C. L. R. 591; *Pritchard v. Jauncey*, 8 C. & P. 99.

(y) *Asher v. Whitlock*, L. R. 1 Q. B. 1; *Board v. Board*, L. R. 9 Q. B. 48; *Hawksbee v. Hawksbee*, 11 H. 230; *Keefe v. Kirby*, 6 I. C. L. R. 591; *Clarke v. Clarke*, I. R. 2 C. L. 395.

(z) *Pritchard v. Jauncey*, 8 C. & P. 99—102.

(a) *Scott v. Nixon*, 3 Dr. & Wal. 388—406.

(b) *Tutkell v. Rogers*, 1 Jo. & La. T. 36.

(c) *Ex parte Chamberlain*, 14 Ch. D. 323.

(d) *Hanks v. Palling*, 6 El. & Bl. 659.

(e) Sug. R. P. Stat., 2nd. ed., 9.

(f) *Dawkins v. Lord Penrhyn*, 4 Ap. Ca. 51. See also *Noyes v. Crankley*, 10 Ch. D. 31.

(but subject to the lease), be deemed to be the receipt of the profits of the land for the purposes of this Act.

3 & 4 Will.  
4, c. 27,  
§ 35.

The surrender and renewal of a lease do not make the estate of the lessee an estate in possession (g).

rent from  
tenant to  
be deemed  
receipt of  
profits.

REAL AND MIXED ACTIONS ABOLISHED.

**36.** And be it further enacted, that no writ of right patent, writ of right quia dominus remisit curiam, writ of right in capite, writ of right in London, writ of right close, writ of right de rationabili parte, writ of right of advowson, writ of right upon disclaimer, writ de rationabilibus divisio, writ of right of ward, writ de consuetudinibus et servitiis, writ of cessavit, writ of escheat, writ of quo jure, writ of secta ad molendinum, writ de essendo quietum de theolonio, writ of ne injuste vexes, writ of mesne, writ of quod permittat, writ of fornedon in descender, in remainder, or in reverter, writ of assize of novel disseisin, nuisance, darrein-presentment, juris utrum, or mort d'ancestor, writ of entry sur disseisin, in the quibus, in the per, in the per and cui, or in the post, writ of entry sur intrusion, writ of entry sur alienation, dum fuit non compos mentis, dum fuit infra ætatem, dum fuit in prisona, ad communem legem, in casu proviso, in consimili casu, cui in vita, sur cui in vita, cui ante divortium, or sur cui ante divortium, writ of entry sur abatement, writ of entry quare ejecit infra terminum, or ad terminum qui præteriit, or causa matrimonii prælocuti, writ of aiel, besaial, tresaiel, cosinage, or nuper obiit, writ of waste, writ of partition, writ of disceit, writ of quod ei deforceat, writ of covenant real, writ of warrantia chartæ, writ of curia claudenda, or writ per quæ servitia, and no other<sup>1</sup> action, real or mixed (except a writ of right of dower<sup>2</sup> or writ of dower unde nihil habet,<sup>2</sup> or a quare impedit,<sup>2</sup> or an ejectment<sup>3</sup>), and no plaint in the nature of any such writ or action (except a plaint for free-

3 & 4 Will.  
4, c. 27,  
§ 36.

Abolition  
of real and  
mixed  
actions.

(g) *Corpus Christi Coll. v. Rogers*, 49 L. J. 4.

3 & 4 Will. bench or dower), shall be brought after the thirty-first day  
4, c. 27,  
**§ 36.** of December, one thousand eight hundred and thirty-four.<sup>4</sup>

<sup>1</sup> This word is mis-spelt in the Queen's printers' copy, and has been corrected here.

<sup>2</sup> These actions were abolished in 1860 by 23 & 24 Vict. c. 126, s. 26, of which is as follows:—

23 & 24  
Vict. c.  
126,  
**§ 26.**

Writs of  
dower  
and *quare  
impedit*  
abolished.

[26. No writ of right of dower *unde nihil habet*, and no plaint for freebench or dower in the nature of any such writ, and no *Quare impedit*, shall be brought after the commencement of this Act in any court whatsoever; but where any such writ, action, or plaint would now lie, either in a superior or in any other court, an action may be commenced by a writ of summons issuing out of the Court of Common Pleas, in the same manner and form as the writ of summons in an ordinary action; and upon such writ shall be indorsed a notice that the plaintiff intends to declare in dower, or for freebench, or in *Quare impedit*, as the case may be.]

Eject-  
ment.

<sup>3</sup> The old form of action in ejectment was modified by s. 169 of the Common Law Procedure Act, 1852 (*h*), and remained in existence until 1875, when it was practically abolished by the Judicature Acts. There is now no special form of action for the recovery of land, though the rules of court contain certain special provisions with regard to such actions (*i*).

<sup>4</sup> A question upon this section arose in 1848, whether debt would lie for a rent charged upon land, and POLLOCK, C. B., said: "I should be prepared to adopt, if necessary, the reasoning that, now there is no remedy by action real for the recovery of a rent in fee, there ought to be a remedy by action of debt"; while, on the other hand, ROLES, B., observed: "I wish to guard against being considered as having expressed an opinion that debt will lie in consequence of the 3 & 4 Will. 4, c. 27, s. 36, having abolished actions real. Such reasoning is far from satisfactory to my mind. Formerly the owner of a rent-seck had no remedy for the recovery of the rent" (*k*). Under the Judicature Acts an ordinary action will lie.

(*h*) 15 & 16 Vict. c. 76.

(*i*) R. S. C., 1883, Ord. IX., r. 9;

Ord. XII., r. 25.

(*k*) *Varley v. Leigh*, 2 Ex. 446—450.

REAL AND MIXED ACTIONS.

**37.** Provided always, and be it further enacted, that when, on the said thirty-first day of December, one thousand eight hundred and thirty-four, any person who shall not have a right of entry to any land shall be entitled to maintain any such writ or action as aforesaid in respect of such land, such writ or action may be brought at any time before the first day of June, one thousand eight hundred and thirty-five, in case the same might have been brought if this Act had not been made, notwithstanding the period of twenty years hereinbefore limited shall have expired.

3 & 4 Will.  
4, c. 27,  
§ 37.

Saving of  
right to  
bring real  
and mixed  
actions till  
1st June,  
1835.

**38.** Provided also, and be it further enacted, that when, on the said first day of June, one thousand eight hundred and thirty-five, any person whose right of entry to any land shall have been taken away by any descent cast, discontinuance or warranty, might maintain any such writ or action as aforesaid in respect of such land, such writ or action may be brought after the said first day of June, one thousand eight hundred and thirty-five, but only within the period during which, by virtue of the provisions of this Act, an entry might have been made upon the same land by the person bringing such writ or action if his right of entry had not been so taken away.

3 & 4 Will.  
4, c. 27,  
§ 38.

Further  
saving in  
certain  
special  
cases.

**39.** And be it further enacted, that no descent cast, discontinuance, or warranty which may happen or be made after the said thirty-first day of December, one thousand eight hundred and thirty-three, shall toll or defeat any right of entry or action for the recovery of land.

3 & 4 Will.  
4, c. 27,  
§ 39.

Descent  
cast, dis-  
continu-  
ance or  
warranty  
not to  
defeat  
right of  
entry.

3 & 4 Will. 4, c. 74, s. 14, is as follows:—

[14. All warranties of lands which, after the thirty-first day of December, one thousand eight hundred and thirty-three, shall be made or entered into by any tenant in tail thereof shall be absolutely void against the issue in tail, and all persons whose estates are to take effect after the determination or in defeasance of the estate tail.]

3 & 4 Will.  
4, c. 74,  
§ 14.

Abolition  
of war-  
ranty.



## MONEY CHARGED ON LAND—LEGACIES.

3 & 4 Will. 40. Repealed by s. 9 and replaced by s. 8 of the R. P. L. A.,  
4, c. 27, 1874, as from the 1st of January, 1879.  
§ 40.

37 & 38 Sect. 8 of the Act of 1874 is as follows:—  
Vict. c. 57,

§ 8. [8. No action or suit<sup>1</sup> or other proceeding<sup>2</sup> shall be brought to recover any sum of money<sup>3</sup> secured by any mortgage, judgment,<sup>4</sup> or lien,<sup>5</sup> or otherwise charged upon or payable out of any land<sup>6</sup> or rent,<sup>7</sup> at law or in equity, or any legacy,<sup>8</sup> but within twelve years next after a present right to receive the same<sup>9</sup> shall have accrued<sup>10</sup> to some person capable of giving a discharge for or release of the same,<sup>11</sup> unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto, or his agent; and in such case no such action or suit or proceeding shall be brought but within twelve years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one, was given.]

After-  
wards in  
twelve  
years.

The new section only differs from the repealed one by omitting the date of its commencement (which is provided for by s. 12 of the R. P. L. A. 1874) and by substituting twelve for twenty years as the period of limitation. The following decisions will, therefore, still be applicable.

Foreclo-  
sure.

<sup>1</sup> Foreclosure has been held to be an action for the recovery of money charged upon land within this section (m). But the better opinion is that a simple foreclosure action is an action to recover land under ss. 2 and 24, and is not within this section. And this must, now, be considered as settled (n).

<sup>2</sup> "I am of opinion that the statute is not to be construed as restricted to actions against real estate, but as affecting charges on real estate, whether sought to be enforced against the real or personal representatives." *Per* BRADY, C. B. (o).

(m) *Dearman v. Wyche*, 9 Sim. 570—575; *Henry v. Smith*, 2 Dr. & War. 381—387; *Du Vigier v. Lee*, 2 H. 326—334; *Sinclair v. Jackson*, 17 B. 405—410; *Sober v. Kemp*, 6 H. 155—160.

(n) *Wrixon v. Vize*, 3 Dr. & War. 104—120; *Harlock v. Ashberry*, 18 Ch. D. 229; 19 Ch. D. 539.

(o) *O'Hara v. Creagh*, L. & T. 65—73.

<sup>3</sup> Sect. 40 of the Act of 1833, and the substituted s. 8 of the Act of 1874, deal with the right to recover the principal sum charged upon land or rent; while s. 42 bars the right to arrears of interest in cases where the principal sum is still recoverable (*p*).

3 & 4 Will.  
4, c. 27,  
§ 40.  
87 & 88  
Vict. c. 57,  
§ 8.

<sup>4</sup> “The language of the 40th section of the recent Statute of Limitations (*q*) is general. There is nothing in the word *judgment*, as there used, to confine its meaning to a judgment which, owing to the nature of the assets of the party indebted, might affect land, but could not operate on personal estate. The intention of the legislature was that no proceeding whatever should be taken on a judgment after the lapse of twenty [now twelve] years from the time when the money secured by it became due, unless some payment should have been made on account of it, or some acknowledgment of it should have been given in writing within the period of twenty [or twelve] years.” *Per* SHADWELL, V.-C. (*r*). The judgment from which this abstract is taken was delivered in 1847, and is consistent with the remarks of LORD ST. LEONARDS in a previous Irish case (*s*), where he observed that it was idle to canvass the point to what extent a judgment is a charge upon real estate, for every judgment was a potential, if not an actual charge upon land (*t*). A judgment creditor of more than twelve years’ standing, who has received neither interest nor acknowledgment, cannot obtain an adjudication in bankruptcy against his debtor (*u*).

Distinction between these sections and s. 42.  
A judgment is within this section.

<sup>5</sup> A vendor’s lien for unpaid purchase-money is “money charged upon land” within s. 40, and it appears that time will run from the completion of the vendor’s title by evidence (*v*).

What is money charged upon land.

Where a testator gave legacies to his daughters, on condition that they should convey certain real estate to which they were entitled to his sons, which they did, it was held that they had no lien for their legacies on the real estate (*w*).

<sup>6</sup> A bond debt is not money “charged upon or payable out of land,” although the heirs may be bound (*x*). But a bond debt may be collaterally secured by a mortgage; and in that case it is, of course, within this section so far as the charge on the land is concerned. And it has been held that the bond is, then, like the covenant in a mortgage (*y*), merely subsidiary to the charge on the land, and that when the remedy

(*p*) *Henry v. Smith*, 2 Dr. & War. 381—384.

(*q*) 3 & 4 Will. 4, c. 27,

(*r*) *Watson v. Birch*, 15 Sim. 523—524.

(*s*) *Henry v. Smith*, 2 Dr. & War. 381.

(*t*) *Ibid.*, p. 388.

(*u*) *Ex parte Tynte*, 15 Ch. D. 125.

(*v*) *Toft v. Stephenson*, 7 H. 1, 1 D. M. & G. 28, 5 D. M. & G. 785—787.

(*w*) *Barker v. Barker*, L. R. 10 Eq. 488.

(*x*) *Roddam v. Morley*, 2 K. & J. 386. Compare *Morley v. Morley*, 5 D. M. & G. 610.

(*y*) *Sutton v. Sutton*, W. N. 1882, p. 172.

3 & 4 Will. 4, c. 27, against the land is barred, the action on the bond or covenant is also barred (z).

**§ 40.** *Quere* whether a share of the produce of real estate devised upon trust for sale and division is money charged upon land within this section (a).  
37 & 38 Vict. c. 57, **§ 8.** *Semble* that it is. It comes within s. 42 (b).

The question what is money "charged upon or payable out of any land or rent" has also been considered in the cases cited below (c).

<sup>1</sup> As to the meaning of "rent" see notes to ss. 1, 2, 3, 7, 8, 9, and 42, pp. 6, 8, 11, 24, 28, 30, and 90.

**Legacies.** <sup>2</sup> "Legacy" includes legacies payable out of personal estate as well as legacies charged upon land (d). A legatee became entitled to enforce payment of a legacy in 1815; but did not do so, although the executor had assets in hand. The executor died in 1824, having charged his real estate with payment of his debts. Held that such charge did not save the bar of the statute, so as to enable the legatee to recover in 1841 (e).

**Lunacy of executor.** Compare s. 25, sub-s. 2 of the Judicature Act, 1873 (f), and see note <sup>1</sup> to s. 25 of 3 & 4 Will. 4, c. 27 (g). The lunacy of a sole executrix does not prevent the statute from running against a legatee (h).

"Legacy" includes "share of residue." Where a person entitled to a share of residue made no claim for thirty years, it was held in 1836, by ALDERSON, B., that the claim was clearly barred by this section (i). In 1841, SHADWELL, V.-C., expressed himself upon the question as follows:—

"Next: with regard to the question as to the meaning of the word 'legacy' in 3 & 4 Will. 4, c. 27, s. 40, I am inclined to think that where the Act speaks of a legacy, it does, in effect, speak of a share of a residue, and it does not make any difference between a share of a residue and a legacy. But then it appears to me to be a very important point, on which I am not bound to give an opinion now" (k). *Prior v. Horniblow* does not appear to have been cited in this case; but, in 1845, it was commented upon in the following terms:—

"With regard to the case of *Prior v. Horniblow* I am not entirely free from doubt; but I am not aware of any decision contradicting it, and I ought not to decide inconsistently with it, unless having a clear opinion that it is not right, which clear opinion I cannot say that I have." *Per* KNIGHT-BRUCE, V.-C. (l), who held that a residuary legatee, who filed a

(z) *Fearnside v. Flint*, 31 W. R. 318.

(a) *Pawsey v. Barnes*, 15 Jur. 943.

(b) *Bowyer v. Woodman*, L. R. 3 Eq. 313.

(c) *Carroll v. Hargrave*, 1. R. 5 Eq. 123; *Baldwin v. Baldwin*, 4 I. Ch. R. 501; *M'Carthy v. Daunt*, 11 I. Eq. R. 29; *Lord Carbery v. Preston*, 13 I. Eq. R. 455.

(d) *Sheppard v. Duke*, 9 Sim. 569.

(e) *Piggott v. Jefferson*, 12 Sim. 26.

(f) 36 & 37 Vict. c. 66.

(g) *Ante*, p. 55.

(h) *Boldero v. Halpin*, 19 W. R. 320. Compare *Binns v. Nichols*, *post*, p. 87.

(i) *Prior v. Horniblow*, 2 Y. & C. 200—206.

(k) *Christian v. Devereux*, 12 Sim. 264—271.

(l) *Adams v. Barry*, 2 Col. 293.

bill twenty-eight years after the testator's death, was barred as to assets received by the executor during the first eight years, but not as to assets received during the subsequent twenty years (*m*). 3 & 4 Will. 4, c. 27, § 40. 37 & 38

By s. 13 of 23 & 24 Vict. c. 38, which came into operation in 1860, a provision similar to that of s. 40 of the Act of 1833, with regard to legacies is applied to "the personal estate or any share of the personal estate of any person dying intestate, possessed by the legal personal representative of such intestate;" and in the latter part of that section "accounting" is added to "payment or acknowledgment," and the period of limitation is twenty years from the "last of such accountings, payments or acknowledgments." Vict. c. 57, § 8. Observations on 23 & 24 Vict. c. 38, s. 13.

The last-mentioned enactment was held by LORD ROMILLY, M. R., to apply only to assets distributed by the administrator; and time was held to be no bar as to assets *retained* by him under the mistaken impression that he was, himself, entitled to them (*n*). It may be doubted how far this decision would apply to a case where assets had been knowingly and wrongfully retained by an administrator having regard to s. 10 of the Real Property Limitation Act, 1874. It is observable that the enactment now under discussion is not incorporated with the Real Property Limitation Acts by s. 9 of the Act of 1874 (*o*), nor has s. 8 of the last-mentioned Act been extended—as it easily might have been—to shares of intestates' estates. The result is that the two cases are now governed by different rules; and persons entitled to express gifts under a will, are barred by twelve years' neglect, while those who are entitled to shares under an intestacy, have twenty years within which to make their claims. It is difficult to find any satisfactory reason for the distinction, unless it be that persons entitled as next of kin are less likely to know of their rights than legatees. Legacies barred in twelve years under new Act; but shares under intestacy in twenty.

"By the words *a present right to receive the same* in the 40th section of the Act we understand an immediate right without waiting for the happening of any future event." *Per* TINDAL, C. J. (*p*). Meaning of "present right."

"The right to a legacy and the right to receive it is quite a different thing. The right to a legacy ordinarily accrues on the death of the testator, but the right to receive does not arise until twelve months after his death. There are many cases in which legacies are vested, but no right to receive them exists until a future period, as at twenty-one or marriage." *Per* LORD ROMILLY, M. R. (*q*). Reversionary interests.

Therefore, where a legacy is given to A. for life with remainder to B., time will not run against B. till A.'s death (*r*). But the mere fact that a

(*m*) *Adams v. Barry*, 2 Col. 285—290.

(*n*) *Reed v. Penn*, 35 L. J. Ch. 464.

(*o*) *Post*, p. 99.

(*p*) *Farran v. Beresford*, 10 Cl. & Fin. 319—334.

(*q*) *Earl v. Bellingham*, 24 B. 448—450.

(*r*) *Ibid.*; *Cresswell v. Dewell*, 4 Giff. 460—465. Compare *McCarthy v. Daunt*, 11 I. Eq. R. 29.

3 & 4 Will.  
4, c. 27,  
§ 40.  
37 & 38  
Vict. c. 57,  
§ 8.

Time does  
not neces-  
sarily run  
from *first*  
accrual of  
right.

Fresh  
right  
accrues in  
respect of  
revival of  
judgment  
by *scire*  
*facias*.  
Effect of  
revivor of  
judg-  
ments.

Person  
capable of  
giving dis-  
charge.

legacy is charged upon property subject to prior charges does not postpone the legatee's present right "to receive and give a discharge" (s).

"It is noticeable that s. 40 of the Act of 1833 does not, like s. 2, provide that the statute shall run from the *first* accrual of the right (f). This distinction is of importance in cases where judgments, which would otherwise have been barred, are revived by *sci. fa.* and thus kept out of the operation of the statute.

Where a plaintiff recovered judgment in 1810, which was revived by *sci. fa.* in 1817, such revival was held by the House of Lords to confer a new right, which might be enforced in 1837. But as the plaintiff had declared on the judgment of 1810 instead of the *sci. fa.* of 1817, he was not allowed to set up the latter by replication (u).

The first part of this decision was followed by the House of Lords the next year in a case where a *sci. fa.* had been obtained in 1828, reviving a judgment of 1813. It was held that this conferred a new right on the plaintiff, who would not be barred under this section until 1848 (x).

A judgment may be revived so as to give a new right more than twenty [or now twelve] years after it was signed if any payment has been made on account in the meantime (y); but it is otherwise if there has been no part payment or acknowledgment (z).

Although a judgment revived by *sci. fa.* will still affect lands subject to the original judgment, in the hands of persons taking interests under settlements, executed after the original judgment was signed and before it was revived, the same rule does not apply to *bond fide* purchasers for value (a). But judgment on an action of debt on the same judgment does not take it out of s. 40 (b).

It has been held in an Irish case (FITZGERALD, J., *dissentiente*) that a writ of revivor is not "an action on a judgment" within s. 20 of the Common Law Procedure Act, 1853 (c), and is not therefore affected by s. 14 of the Mercantile Law Amendment Act, 1856; but is still governed by s. 40 of 3 & 4 Will. 4, c. 27 (d).

"On the whole it appears to me that the statute cannot be applied

(s) *Bright v. Larcher*, 27 B. 130, 4 De G. & J. 608; *Proud v. Proud*, 11 W. R. 101. Compare *Ravenscroft v. Frisby*, 1 C. C. C. 16.

(t) *Ryan v. Cambie*, 2 I. Eq. R. 328—330; and compare *Farran v. Ottiswell*, 2 Jeb. & Sy. 97—109.

(u) *Farran v. Biresford*, 10 Cl. & Fin. 319—339.

(x) *Farrell v. Gleeson*, 11 Cl. & Fin. 702. See also *Re Blake*, 2 I. Ch. R. 643.

(y) *Williams v. Welch*, 3 Dow. & Law. 565.

(z) *Dunne v. Doyle*, 10 I. Ch. R. 502. See also *Kealy v. Bodkin*, 9 I. L. R. 383.

(a) *Franks v. Mason*, 9 I. Eq. R. 358; *Murray v. Clarke*, 4 I. C. L. R. 610; *Re Bodkin*, 12 I. Ch. R. 61; *Kirkwood v. Lloyd*, 11 I. Eq. R. 561, 12 I. Eq. R. 585. See also *Ryan v. Cambie*, 2 I. Eq. R. 328.

(b) *Walters v. Sidwill*, 9 I. L. R. 362—381.

(c) 16 & 17 Vict. c. 113.

(d) *Wall v. Walsh*, I. R. 4 C. L. 103—114.

to a case where there is no assignable person liable to pay the charge, no person who, by the delay, could be induced to suppose that the charge was abandoned or merged, and where the rent out of which the interest of the charge ought to be paid is receivable by and belongs to the same person who is entitled to the interest." *Per* LORD LANGDALE, M. R. (e). Therefore, where the same person is entitled to an estate in the land or rent, and also to money charged thereon, the statute does not apply (f). But where an executor, who was also residuary legatee, became lunatic, and limited administration during his lunacy was granted to X., it was held that time, thereupon, began to run as between X. and the lunatic (g).

3 & 4 Will.  
4, c. 27,  
§ 40.  
37 & 38  
Vict. c. 57,  
§ 8.

Same  
person  
entitled to  
land and  
charge.

<sup>12</sup> Payment of interest by a receiver of the rents of one of three estates comprised in the same mortgage, was held to keep the mortgage alive as to the other two estates (h).

Part pay-  
ment.

Payment of interest by a widow entitled to a dower out of a mortgaged estate has been held to keep the statute from running in favour of the heir (i). And payment of interest by tenants for life in possession under a will keeps the remedy of the mortgagee alive against the land and the testator's estate (k). "Although, where the same person holds two perfectly distinct characters it may be necessary to distinguish in which of the two characters the payment was made, yet, as was held in *Fordham v. Wallis* (l), 'what we have to consider in these cases is the act of the person and not the position of the estate, for the existence or non-existence of the demand depends upon the act of the person, and not upon the relative liability of the property'" (m).

Payment of one legacy by an executor out of his own moneys does not amount to an admission of assets in favour of other legatees (n).

<sup>13</sup> A purchaser died without having paid his purchase money, and devised the purchased land to trustees who disclaimed. New trustees having been appointed by the Court, their solicitor wrote to the vendor's solicitor that the purchase money was ready to be paid and was lying at banker's interest. This was held a sufficient acknowledgment (o).

What is an  
acknow-  
ledgment  
within  
s. 40.

(e) *Burrell v. Earl of Egremont*, 7 B. 203—235. Compare *Lord Kensington v. Bouverie*, 7 D. M. G. 134—148; *Faulkner v. Daniel*, 3 H. 199; *Lord Carbery v. Preston*, 13 I. Eq. R. 455.

(f) See *Lord Kensington v. Bouverie*, 7 D. M. G. 134—148; *Faulkner v. Daniel*, 3 H. 199; *Lord Carbery v. Preston*, 13 I. Eq. R. 455.

(g) *Binns v. Nichols*, L. R. 2 Eq. 256—260.

(h) *Chinnery v. Evans*, 11 H. L. C. 115. Compare *Dickenson v. Teasdale*,

1 De G. J. & S. 52.

(i) *Ames v. Mannering*, 26 B. 533.

(k) *Re Gale, Blake v. Gale*, 22 Ch. D. 820.

(l) 10 H. 228.

(m) *Per* BACON, V. C., *Pears v. Laing*, L. R. 12 Eq. 41—54. Compare *Seager v. Aston*, 8 Jur. N. S. 481; 5 W. R. 548; and see also *Staley v. Barrett*, 26 L. J. Ch. 321.

(n) *Cadbury v. Smith*, L. R. 9 Eq. 37.

(o) *Toft v. Stephens n*, 1 D. M. G. 28—33—40.

3 & 4 Will. 4, c. 27, § 40. The following letter, written by the daughter of a trustee for sale at his dictation, was held an acknowledgment, under s. 40, binding upon the *cestui que trust*:—"I regret that it is not in my power to return you a

Admission in letter. more satisfactory answer with regard to the claim of the late Mr. Aubert upon the estate of the late Lady St. John. Be assured I shall be happy to discharge the bonds to the late Mr. Aubert as soon as it is in my power" (p).

Master's report. A statement in a Master's Report was held not to amount to an acknowledgment, inasmuch as the master was not the agent of both parties (q); but it appears from the judgment of LORD ST. LEONARDS in a subsequent case (r) that the creditor in that case was not a party to the suit in which the report was made. And this decision was ques-

Insolvent's schedule. tioned in another case (s) where it was held that the insertion of a debt in an insolvent's schedule was a sufficient acknowledgment (t). An

Admission in affidavit or answer. admission in a schedule (s), affidavit (u), or answer is an acknowledgment, at any rate in favour of a creditor who is a party to the action in which

Admission by will. such admission is made (x). An admission of indebtedness by will is a sufficient acknowledgment (y).

In addition to these cases, the reader should refer to the decisions cited under s. 42 of 3 & 4 Will. 4, c. 27 (z), which is worded similarly to s. 40. Reference may also be made to ss. 14 and 28 (a) and the notes thereto (b).

Part payment by "agent." "There is no doubt that the payment of a part of the principal or some interest by a person expressly or impliedly authorised to make the payment, will be equivalent to a payment by the party liable. . . . The payment, however, cannot be by a mere stranger." *Per CUSACK SMITH, M. R. (Ireland) (c).*

Who is agent for the purpose of giving acknowledgment. An acknowledgment by trustees is binding on their *cestui que trust* (d), and the same rule applies to trustees appointed by the Court in the place of disclaiming trustees (e).

A solicitor is an agent within s. 40 (f).

(p) *Lord St. John v. Boughton*, 9 Sim. 219—225.

(q) *Hill v. Stawell*, 2 I. L. R. 302.

(r) 3 Dr. & War. 228.

(s) *Barrett v. Birmingham*, 4 I. Eq. R. 537.

(t) See also *Morrogh v. Power*, 5 I. L. R. 494, and *Hannan v. Power*, 8 I. L. R. 505.

(u) *Tristram v. Hart*, L. & T. 186—191.

(x) *Blair v. Nugent*, 3 J. & La. T. 658

(y) *Millington v. Thompson*, 3 I. Ch. R. 236.

(z) P. 96, *post*.

(a) Pp. 36 and 67, *ante*.

(b) See also *Vincent v. Willington*, L. & T. 456.

(c) *Homan v. Andrews*, 1 I. Ch. R. 106—112.

(d) *Lord St. John v. Boughton*, 9 Sim. 219—225.

(e) *Toft v. Stephenson*, 1 D. M. G. 28

(f) *Toft v. Stephenson*, 1 D. M. G. 28.



## ARREARS OF DOWER.

**41.**<sup>1</sup> And be it further enacted, that after the said thirty-first day of December one thousand eight hundred and thirty-three, no arrears of dower, nor any damages on account of such arrears, shall be recovered or obtained by any action or suit for a longer period than six years next before the commencement of such action or suit.<sup>2</sup>

3 & 4 Will.  
4, c. 27,  
**§ 41.**  
Only six  
years'  
arrears of  
dower  
recover-  
able.

<sup>1</sup> This section is not affected by the R. P. L. A., 1874.

<sup>2</sup> Where the widow of a tenant in tail in possession waited for thirty-one years after his death before filing a bill to establish her right to dower, and the heir in tail had been in possession, the bill was dismissed with costs (*h*).

## MONEY CHARGED ON LAND—ARREARS OF INTEREST.

**42.**<sup>1</sup> And be it further enacted, that after the said thirty-first day of December, one thousand eight hundred and thirty-three, no arrears<sup>2</sup> of rent<sup>3</sup> or of interest<sup>4</sup> in respect of any sum of money charged upon<sup>5</sup> or payable out of any land<sup>6</sup> or rent, or in respect of any legacy,<sup>7</sup> or any damages in respect of such arrears of rent or interest, shall be recovered by any distress, action, or suit but within six years<sup>8</sup> next after the same respectively shall have become due, or next after an acknowledgment<sup>9</sup> of the same in writing shall have been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable, or his agent: Provided nevertheless, that where any prior mortgagee or other incumbrancer<sup>10</sup> shall have been in possession of any land, or in the receipt of the profits thereof, within one year next before an action or suit shall be brought by any person entitled to a subsequent mortgage or other incumbrance on the same land, the person entitled to such subsequent mortgage or incumbrance may recover in such action or suit the arrears of interest which shall have become due during the

3 & 4 Will.  
4, c. 27,  
**§ 42.**  
Only six  
years'  
arrears of  
rent or  
interest to  
be recover-  
able.

(*h*) *Marshall v. Smith*, 5 Giff. 37.



3 & 4 Will. 4, c. 27,  
**§ 42.** whole time that such prior mortgagee or incumbrancer was in such possession or receipt as aforesaid, although such time may have exceeded the said term of six years.<sup>11</sup>

<sup>1</sup> This section is not retrospective (i) except as regards acknowledgments (k).

<sup>2</sup> "The 2nd section contemplates and provides for the case where the right or title to the annuity itself is disputed. . . . The 42nd section contemplates and provides for the case, where the title to the annuity is not disputed, but the distress is made for arrears due." *Per* TINDAL, C. J. (l). A fee farm rent is within this section and is not affected by 3 & 4 Will. 4, c. 42, s. 3 (m). It has been held that a tithe rent charge is within s. 42 of 3 & 4 Will. 4, c. 27 (n); although now only two years' arrears are recoverable under 6 & 7 Will. 4, c. 71, s. 82 (o).

Fee farm  
rent.

Meaning  
of "rent"  
in this  
section.

<sup>3</sup> "A reference to the rents specified in the 1st section of the statute shows that the arrearages of rent mentioned in s. 42 have no relation to a conventional rent reserved on a lease. . . . I should say it was proposed to include other rents of the same nature as those to which the Act, by its title and preamble, was intended to apply, rather than conventional rents reserved on a lease." *Per* TINDAL, C. J., who, however (p), said that it was unnecessary to give an opinion on the point, as the case then before him was within 3 & 4 Will. 4, c. 42, s. 3, which must be considered an exception out of the section under discussion (q).

This section  
applies to  
interest of  
moneys  
included in  
s. 40.

"Charge"  
includes  
mortgage.

<sup>4</sup> "That section (r) therefore provides that the principal shall not be recoverable after twenty [now twelve] years except in the several cases enumerated therein: then follows the 42nd section, which embraces only the interest of the sums provided for in the 40th section." *Per* LORD ST. LEONARDS (s).

<sup>5</sup> "Although the word *charge* does not by its own force include mortgages, yet, as the 40th clause expressly mentions mortgages, they must be included in the 42nd, from the necessity of construing the two clauses by reference to each other." *Per* STUART, V.-C. (t).

(i) *Paddon v. Bartlett*, 3 A. & E. 884—895; *Peyton v. M'Dermott*, 1 Dr. & War. 198.

(k) *Vincent v. Willington*, L. & T. 456—469.

(l) *James v. Salter*, 3 Bing. N. C. 544—552.

(m) See note <sup>8</sup>, post. *Humfrey v. Wade-Gery*, 7 C. B. 567.

(n) *Eccl. Com. v. Marquis of Sligo*, 5 L. Ch. R. 46.

(o) *Re Camberwell Rent Charge*, 4 Q. B. 151.

(p) *Paget v. Foley*, 2 Bing. N. C. 688—9.

(q) See note <sup>8</sup>, post.

(r) Sect. 40 of 3 & 4 Will. 4, c. 27.

(s) *Hughes v. Kelly*, 2 Dr. & War. 482—489.

(t) *Bolding v. Lane*, 3 Giff. 561—574.

<sup>6</sup> A mortgagee of turnpike tolls was held entitled to recover more than six years' arrears, on the ground that such tolls are not an interest in land within the statute (u). On the other hand, a mortgage of a canal, works and rates, was held within this section (x). See notes of these cases under s. 1 (y). 3 & 4 Will. 4, c. 27, § 42.

Debts secured by judgments are also within this section, and only six years' arrears of interest can be recovered (z).

In a case where many years elapsed between a contract for sale and completion, it was held that interest on the unpaid purchase money, although it would run from the contract, would not become payable until a good title was shown. "It is upon completion that interest becomes due, although to be calculated from the inception of the contract." *Per* TURNER, L. J. (a). Therefore it would seem that a vendor who allowed more than six years to elapse after completion without enforcing payment of his purchase money, could only recover six years' arrears.

An annuity charged upon land is within this section (b), being included in the term "rent" (c), but an annuity not charged upon land (d), but charged upon personal estate (e), or secured by bond (f), is not. Arrears of annuities are within this section, if charged on land.

<sup>7</sup> Where a legacy had remained unpaid for more than thirty years, it was held that interest was only payable for six years (g), and the interest is to be calculated from the filing of the bill (now the issue of the writ), although it may not be filed (or issued) by the legatee (h). Where a lunatic had received the interest of a legacy for more than twenty years by mistake, it was held that the legatee could only recover six years' arrears of interest (i). Interest on legacies.

<sup>8</sup> Where money is simply "charged upon or payable out of land or rent," the arrears fall clearly within s. 42 of 3 & 4 Will. 4, c. 27, as the cases cited below will show. But if such arrears, or the money in respect of which they have accrued, are collaterally secured—for instance, by covenant, bond, or a charge upon personal estate—a question arises Conflict between 3 & 4 Will. 4, c. 27, s. 42, and 3 & 4 Will. 4, c. 42, s. 3.

(u) *Mellish v. Brooks*, 3 B. 22—28.

(x) *Hodges v. Croydon Canal Co.*, 3 B. 81—89.

(y) *Ante*, p. 6.

(z) *Henry v. Smith*, 2 Dr. & War. 381.

(a) *Toft v. Stephenson*, 5 D. M. G. 735—739.

(b) *Uppington v. Tarrant*, 12 I. Ch. R. 262; *Franris v. Grover*, 5 H. 39; *Hunter v. Nockolds*, 1 M. & G. 640.

(c) *Ferguson v. Lirington*, 9 I. Eq. R. 202.

(d) *Rock v. Callen*, 6 H. 531—536.

(e) *Re Ashwell*, Joh. 112.

(f) *Sims v. Thomas and Strachan v. Thomas*, 12 A. & E. 536.

(g) *Hughes v. Williams*, 3 M. & G. 683—688.

(h) *Chappell v. Rees*, 1 D. M. G. 393—398.

(i) *Re Walker* L. R. 7 Ch. 120—123.

3 & 4 Will. 4, c. 27, as to the effect of the statute 3 & 4 Will. 4, c. 42, s. 3, which is as follows:—

§ 42.  
3 & 4 Will.  
4, c. 42,  
§ 3.

Effect of  
the two  
enact-  
ments as  
regards  
money  
charged on  
land, and  
also col-  
laterally  
secured by  
bond or  
covenant.

[3. That all actions of debt for rent upon an indenture of demise, all actions of covenant, or debt upon any bond or other specialty, and all actions of debt or *scire facias* upon any recognizance, and also all actions of debt upon any award where the submission is not by specialty, or for any fine due in respect of any copyhold estates, or for an escape, or for money levied on any *fieri facias*, and all actions for penalties, damages, or sums of money given to the party grieved by any statute now or hereafter to be in force, that shall be sued or brought at any time after the end of the present session of Parliament, shall be commenced and sued within the time and limitation hereinafter expressed, and not after, (that is to say,) the said actions of debt for rent upon any indenture of demise or covenant, or debt upon any bond<sup>1</sup> or other specialty actions of debt or *scire facias* upon recognizance, within ten years after the end of this present session, or within twenty years after the cause of such action or suit, but not after<sup>2</sup>; the said actions by the party grieved one year after the end of this present session, or within two years after the cause of such actions or suits, but not after; and the said other actions, within three years after the end of this present session, or within six years after the cause of such actions or suits, but not after; provided that nothing herein contained shall extend to any action given by any statute where the time for bringing such action is or shall be by any statute specially limited.<sup>3</sup>]

<sup>1</sup> An action in England on a bond executed in India may be brought within twenty years (*h*).

<sup>2</sup> See *Robinson v. Currey* (*i*).

<sup>3</sup> The Act from which this section is taken, received the royal assent after 3 & 4 Will. 4, c. 27, but came into operation before it; and it will be seen that it includes some cases which are within s. 42 of the earlier statute. The question has often been raised whether arrears which are

(*h*) *Alliance Bank of Simla v. Carey*, 5 C. P. D. 429. (i) 7 Q. B. D. 465.

within both enactments are recoverable for twenty years, or only for six years; and the result appears to be that *as against the land* only six years can be recovered, and, until recently, the arrears for the preceding fourteen years might have been recovered in a personal action. Where an annuity was charged upon the testator's *freehold and leasehold estates*, it was held that arrears were only recoverable for six years (k).

3 & 4 Will.  
4, c. 27,  
§ 42.  
3 & 4 Will.  
4, c. 42,  
§ 3.

Where a mortgage of a canal, works, and rates contained no covenant for payment of interest, it was held that the mortgagee could only recover six years' arrears (l).

Where  
mere  
charge on  
land, only  
six years'  
arrears  
recover-  
able.

Where there is a mere charge and not an express trust of an annuity, only six years' arrears can be recovered (m).

Similarly the mortgagee of a married woman's reversionary interest was held entitled to no more than six years' arrears. LORD HATHERLEY (then V.-C. Wood) remarked, "I put the covenant entirely aside, it being the covenant of a married woman" (n).

Of course, in cases which do not fall within s. 42 of 3 & 4 Will. 4, c. 27, twenty years' arrears are recoverable under the later statute. And in one case where annuities charged upon personal estate had been only partially paid, the annuitants were allowed to recover arrears of the unpaid balances for thirty-seven years (o). So, arrears of an annuity secured by bond are recoverable for twenty years (p). And when a lease contains a covenant for payment of rent, the lessor may recover arrears for twenty years, by action on the covenant under the later statute (q). Similarly it has been held that when a mortgage contains a covenant for payment the mortgagee may recover twenty years' arrears of interest by action on the covenant (r). Mortgagees of a reversion were held entitled to more than six years' arrears of interest under a covenant by mortgagors that interest should be capitalised (s). But where annuities, rents and interest on mortgages have been secured by bond or covenant, and also charged on land, the question often arose, before the Judicature Acts came into operation, whether an action on the bond or covenant was necessary in order to recover more than six years' arrears, or whether 3 & 4 Will. 4, c. 42, did not so far repeal 3 & 4 Will. 4, c. 27, s. 42, as to render twenty years' arrears recoverable in an action against the land; and after some conflict of decision, it was ultimately settled that only six years' arrears could be recovered

Where no  
charge on  
land  
twenty  
years'  
arrears  
recover-  
able.  
Where  
both  
charge on  
land and  
covenant  
twenty  
years'  
arrears re-  
coverable  
by action  
on the  
covenant;  
but not in  
action to  
enforce  
security.

(k) *Francis v. Grover*, 5 H. 39—49.

(l) *Hodges v. Croydon Canal Co.*, 3 B. 86—90.

(m) *Cunningham v. Foot*, 3 Ap. Ca. 974.

(n) *Bouryer v. Woodman*, L. R. 3 Eq. 313—315.

(o) *Re Ashwell*, Joh. 112—116.

(p) *Sims v. Thomas, Strachan v. Thomas*, 12 A. & E. 536—538.

(q) *Paget v. Foley*, 2 Bing. N. C. 679.

(r) *Sinclair v. Jackson*, 17 B. 405; *Elvy v. Norwood*, 2 De G. & S. 240; *Du Vigier v. Lee*, 2 H. 326.

(s) *Clarkson v. Henderson*, 14 Ch. D. 349.

3 & 4 Will.  
4, c. 27,  
§ 42.  
3 & 4 Will.  
4, c. 42,  
§ 3.

Foreclo-  
sure and  
redemp-  
tion stand  
on the  
same  
footing.

Mortgagee  
may tack  
remedy on  
covenant  
to mort-  
gage in  
some cases.

in an action against the land. As regards mortgages a distinction has been drawn between suits for foreclosure and redemption, and the following opinion upon the point was expressed by KINDERSLEY, V.-C.: "The intention of the legislature, I think, was that if a man chose to let interest run into arrear for more than six years, and then came to a court of justice to recover the interest, he shall only be entitled to recover six years' interest; but it does not follow that the legislature intended that a mortgagor who has lost his legal right and comes to the Court insisting on his equity to redeem should be allowed—although he has failed to pay the interest which he ought to have paid for more than six years—to redeem on payment only of six years' interest. There would be no justice in such a construction of the statute" (t). But the law may now be considered as settled in accordance with the rule laid down by WIGRAM, V.-C., as follows:—

"It has always appeared to me that the terms on which a mortgagor or those claiming under him are entitled to redeem must be the same whether they are to be ascertained in a suit for redemption or for foreclosure" (u). So that, *as against the land*, only six years' arrears can be recovered either in foreclosure or redemption proceedings (x), although the mortgage is of a reversion (y). In some cases, however, a mortgagee has been allowed to tack his remedy on the covenant to his charge on the land as against the heirs of the mortgagor, although it was said that he could not do so against the mortgagor himself (z). And when a fund was in court in an administration suit it was held, on petition by a mortgagee, that he was entitled to more than six years' arrears of interest (a). But in a more recent case, where money had been paid into court under the Lands Clauses Consolidation Act, it was held, on the petition of an equitable mortgagee of the land purchased, that he was only entitled to six years' arrears of interest. In giving judgment, MALINS, V.-C., commented on the last cited case in these terms:—

"In *Edmunds v. Waugh* the position of the parties was as if the mortgagee had the money actually in his hands as mortgagee, and what V.-C. KINDERSLEY really dealt with was the right of retainer, and he held that the petition which in effect put the mortgagee in possession of funds which really belonged to him was not a suit to recover interest within the meaning of the Statutes of Limitation" (b). In a still more

(t) *Edmunds v. Waugh*, L. R. 1 Eq. 418—421.

(u) *Sober v. Kemp*, 6 H. 155—160.

(x) *Round v. Bell*, 30 B. 121; *Shaw v. Johnson*, 1 Dr. & S. 412—415; *Elvy v. Norwood*, 2 De G. & S. 240; *Hughes v. Kelly*, 2 Dr. & War. 482; *Du Vigier v. Lee*, 2 H. 326.

(y) *Sinclair v. Jackson*, 17 B. 405.

But compare *Wheeler v. Howell*, 3 K. & J. 201.

(z) *Sinclair v. Jackson*, 17 B. 405; *Du Vigier v. Lee*, 2 H. 326; *Elvy v. Norwood*, 2 De G. & S. 240.

(a) *Edmunds v. Waugh*, L. R. 1 Eq. 418.

(b) *Re Stead's Mortgage*, 2 Ch. D. 713—717. Compare *Re Walker*, L. R. 7 Ch. 126.

recent case a mortgagee was only allowed six years' arrears out of a fund in court (c).

And even where a mortgaged estate had been sold under a power of sale, it was held by LORD ROMILLY that the mortgagee could only retain six years' arrears as against the mortgagor (d).

This case was, however, compromised on appeal by payment of less than one-third of the amount claimed, and it was subsequently disapproved of by KINDERSLEY, V.-C., in *Edmunds v. Waugh*, p. 94, *ante*. Where an annuity was charged upon land and also secured by covenant, it was held that the annuitant, in a suit to enforce the charge against the land, could only recover six years' arrears from the time when he brought in his claim (e). This case may be taken to have overruled *Du Vigier v. Lee* (f), and the result thus arrived at is lucidly stated by LORD ROMILLY, M.R. (g), in these words:—

"After some fluctuations of decisions it was finally decided by the LORD CHANCELLOR COTTENHAM in *Hunter v. Nockolds* that effect was to be given to both statutes and to both clauses, that neither overruled the other, and that, accordingly, as against the estate on which an annuity or a mortgage was charged no more than six years' arrears could be recovered *against the estate*, but that in an *action of covenant* against the covenantor twenty years' arrears of annuity or interest of a mortgage might be recovered, but that they formed no charge on the estate beyond the six years'. The judgment when recovered would constitute a charge on the real estate of the defendant in the action, but this does not affect the principle." In the case thus referred to LORD COTTENHAM also said (h), "The provisions of the two (Acts) must, if possible, be reconciled, which can only be done by considering the first Act as applicable only to the land, and the latter as applicable only to the person. . . . In some of the cases which have arisen under these Acts the Courts have treated this provision of the second Act as an exception out of the enactment of the former; the conjoined enactments would, in that case, be that no more than six years' arrears of rent or interest in respect of any sum charged upon or payable out of any land or rent shall be recovered by any distress action or suit other than, and except in, actions upon covenant or debt upon specialty, in which cases the limitation shall be twenty years."

This, however, is scarcely a satisfactory solution of the difficulty, and the following remarks of LORD ST. LEONARDS, when Lord Chancellor of Ireland, will be endorsed by no inconsiderable proportion of the profession:—"I must say it is most desirable that the legislature should

(c) *Re Slater*, 11 Ch. D. 227.

(d) *Mason v. Broadhurst*, 38 B. 296.

(e) *Hunter v. Nockolds*, 1 M. & G. 640. Compare *Harrison v. Duignan*,

2 Dr. & War. 295.

(f) 2 H. 326.

(g) *Lewis v. Duncombe*, 29 B. 175—187.

(h) 1 M. & G. 640—652.

3 & 4 Will.  
4, c. 27,

§ 42.

3 & 4 Will.  
4, c. 42,

§ 3.

Result of  
the de-  
cisions on  
this point.

3 & 4 Will. 4, c. 27, § 42.  
8 & 4 Will. 4, c. 42, § 3.

clear up the difficulties which they themselves have created, for it seems difficult to reconcile the two statutes" (i). The R. P. L. A., 1874, contained no express enactment to remove this difficulty, and though under the Judicature Acts and the Rules of the Supreme Court, which permit the joinder of various causes of action, it has become the ordinary practice to claim and give personal judgment in actions to enforce a charge upon land of money also secured by bond or covenant, it has now been held by the Court of Appeal that, so far as principal money is concerned, the right of action on the bond or covenant is gone as soon as the action against the land is barred under s. 8 of the R. P. L. A., 1874 (j), and the reasons upon which the judgments in those cases were based would apply equally to arrears of interest or other annual payments secured by a charge upon land and also by a bond or covenant. Where an annuity charged on land became payable in 1851, and no payment had been made, it was held to be barred on a claim being made in 1884 (k).

What amounts to an acknowledgment within this section.

\* A letter in 1833 from the treasurer of a company to a mortgagee contained the following sentences:—"No interest has been paid since 1821 to the government, nor to anyone that holds securities, nor is it likely while matters remain as they now are. . . . What a future day may produce is quite uncertain; but as an individual I have some ground to think we may yet see better days. . . . I am at all times willing and happy to give you or any other gentleman that has embarked property in the present important undertaking, any information I am able and you require." This was held to give a right of action within six years (l). It has been laid down that an acknowledgment, to be binding, must be made with a view of making the person giving it liable; and not with a view of explaining that some other person is liable (m).

A recital in a transfer of a mortgage is an acknowledgment binding upon the parties. But a recital that more than six years' arrears of interest were due, though binding upon the mortgagor, who was a party, was held not binding upon a subsequent mortgagee, who was not a party to the transfer (n). A statement in a petition that certain land was charged with twenty years' arrears of an annuity was held to amount to an acknowledgment (o). An acknowledgment to a stranger is not binding (p). An acknowledgment by a tenant for life of a settled estate, as to an arrear of interest due on

Acknowledgment to stranger not binding.

(i) *Vincent v. Going*, 1 Jo. & La. T. 703.

(j) *Sutton v. Sutton*, 22 Ch. D. 511; *Fearnside v. Flint*, 22 Ch. D. 579.

(k) *Hughes v. Coles*, W. N. (1884), p. 180.

(l) *Jortin v. S. E. Ry. Co.*, 6 D. M. & G. 270—290.

(m) *Holland v. Clark*, 1 Y. & C. Ch. 151—169.

(n) *Bolding v. Lane*, 1 D. J. & S. 122.

(o) *Re West's Estate*, 3 L. R. Ir. 77.

(p) *Holland v. Clark*, 1 Y. & C. Ch. 151—170; *Grenfell v. Girdlestone*, 2 Y. & C. 662—676.



a mortgage affecting the inheritance, was held by CUSACK SMITH, M.R., in an Irish case, to be binding upon the remaindermen (*p*). 3 & 4 Will.  
4, c. 27,  
§ 42.

Payment of interest on a promissory note has been held to amount to evidence of a demand for payment of the principal, so as to make the statute begin to run (*q*). 3 & 4 Will.  
4, c. 42,  
§ 3.

And, of course, an acknowledgment to a third person as agent of the creditor is sufficient. See the notes to ss. 14, 28 and 40 (*r*).

<sup>10</sup> A judgment creditor is a "prior incumbrancer." *Per* LORD ST. LEONARDS (*s*). But outstanding charges assigned to a trustee for a purchaser of the equity of redemption are not within the exception (*t*). What constitutes a  
"prior  
incumbrancer."

This section does not apply to annuities charged upon a reversionary interest in land; for time does not run until such interest falls into possession (*u*). On the other hand, it has been held that the mortgagee of a reversion (*x*), or the judgment creditor of a remainderman, is not entitled, under this section, to recover more than six years' arrears of interest which accrued due during the possession of the tenant for life (*y*).

"The exception in the statute is merely that while a prior incumbrancer is in possession, his possession shall not prejudice a subsequent incumbrancer, who is waiting, and comes in in reasonable time, to make the fund available for the payment of his demand." *Per* LORD ST. LEONARDS (*z*). And a tenant for life is not a "prior incumbrancer" as regards a creditor of a remainderman (*a*).

A., being entitled, subject to certain life estates to the residuary personal estate of X. (which consisted partly of a mortgage debt), mortgaged his reversionary interest to B. It was held, on the death of the last tenant for life, that B.'s mortgage was not an interest in land within this section, and that he was entitled to interest from the date of the mortgage (*b*).

<sup>11</sup> Where a judgment creditor carries in a claim in a suit or action he is entitled, under this section, to arrears of interest for six years, prior to the carrying in of his claim (*c*). As to the operation of a pending suit or action, in which claims can be made, upon rights which would otherwise have been barred, see notes to s. 24 (*d*). Claim in a  
pending  
action is  
equal to  
bringing  
an action.

(*p*) *Re Fitzmaurice*, 15 I. Ch. R. 445.

(*q*) *Re Rutherford, Brown v. Rutherford*, 14 Ch. D. 687.

(*r*) Pp. 37, 70 and 88, *ante*.

(*s*) *Henry v. Smith*, 2 Dr. & War. 381—390.

(*t*) *Chinnery v. Evans*, 11 H. L. C. 115—136—140.

(*u*) *Wheeler v. Howell*, 3 K. & J. 198—201.

(*x*) *Sinclair v. Jackson*, 17 B. 405.

(*y*) *Vincent v. Going*, 1 J. & La. T. 697—701.

(*z*) *Vincent v. Going*, 1 J. & La. T. 697—703.

(*a*) *Ibid*. See also *Drought v. Jones*, 2 Ir. Eq. R. 303, and *Montgomery v. Southwell*, 2 Con. & Law. 263.

(*b*) *Smith v. Hill*, 9 Ch. D. 143.

(*c*) *Greenway v. Bromfield*, 9 H 201—204.

(*d*) P. 51, *ante*.



- 3 & 4 Will. 4, c. 27, § 42.  
3 & 4 Will. 4, c. 42, § 3.
- gagees of a tenant for life entered into possession under an order in a suit, and remained in possession for nine years after the death of the tenant for life (such death being unknown to both parties), it was held by the Court of Appeal, on the petition of the remainderman, reversing the decision of HALL, V.-C. (e), that they were only entitled to an account of the rents and profits for six years previous to the presentation of their petition (f). The statute was held to be no bar to a mortgagor's right to recover damages for coal which a mortgagee in possession had allowed trespassers to abstract from under the mortgaged property (g). The rule that an infant may treat a person who enters on his land during his minority as his bailiff, takes such cases out of this section (h).
- Infants.

## SPIRITUAL COURTS.

- 3 & 4 Will. 4, c. 27, § 43.
- Spiritual courts to be bound by Act.
43. And be it further enacted, that after the said thirty-first day of December, one thousand eight hundred and thirty-three, no person claiming any tithes, legacy, or other property, for the recovery of which he might bring an action or suit at law or in equity, shall bring a suit or other proceeding in any spiritual court to recover the same but within the period during which he might bring such action or suit at law or in equity.

## EXTENT OF ACTS.

- 3 & 4 Will. 4, c. 27, § 44.
- Act not to extend to Scotland.
44. Provided always, and be it further enacted, That this Act shall not extend to Scotland; *and shall not, so far as it relates to any right to permit<sup>1</sup> to or bestow any church, vicarage, or other ecclesiastical benefice, extend to Ireland.<sup>2</sup>*

<sup>1</sup> *Lege* "present."

- Ireland. <sup>2</sup> The excepted portion of the Act 3 & 4 Will. 4, c. 27, was extended to Ireland in 1843 and 1844 (i), and remained in operation there till the

(e) 2 Ch. D. 617.

(f) *Hickman v. Upsall*, 4 Ch. D. 114.

(g) *Hood v. Easton*, 2 Giff. 692. Compare *Dean v. Thwaite* and *Ecclesiastical Commissioners v. N. B. R.*

Co., cited under s. 26, p. 63, *ante*.

(h) See *Nanney v. Williams*, 22 B. 452, and notes to ss. 3 and 16, *ante*, pp. 12 and 41.

(i) 6 & 7 Vict. c. 54; 7 & 8 Vict. c. 27.

passing of the Irish Church Act, 1870 (*k*), s. 10 of which makes it again 3 & 4 Vict. inapplicable. The Act 3 & 4 Will. 4, c. 27, applies to New South 4, c. 27, Wales (*l*), but not to Jamaica (*m*). In India the time of limitation is § 44. twelve years (*n*) as regards land, and six years (*o*) as regards other Colonies. actions. As to Canada, see *Herrick v. Sirby* (*p*) and *Macdonald v. India*. *Lambe* (*q*). Canada

**45.** And be it further enacted, That this Act may be 3 & 4 Will. amended, altered or repealed during this present session of 4, c. 27, Parliament. § 45.

See 3 & 4 Will. 4, c. 42, s. 3, and notes thereto (*r*).

The following are the remaining provisions of the R. P. L. A. 1874:—

#### ACTS OF 1833 AND 1874 CONSOLIDATED.

[9. From and after the commencement of this Act all the 37 & 38 provisions of the Act passed in the session of the third and Vict. c. 57, fourth years of the reign of His late Majesty King William § 9. the Fourth, chapter twenty-seven, except those contained in Portions of 3 & 4 Will. the several sections thereof next hereinafter mentioned, shall 4, c. 27, remain in full force, and shall be construed together with repealed, and re- this Act, and shall take effect as if the provisions herein- maining portions to before contained were substituted in such Act for the be con- provisions contained in the sections thereof numbered two, strued with Act of 1874. five, sixteen, seventeen, twenty-three, twenty-eight, and forty respectively (which several sections, from and after the commencement of this Act, shall be repealed), and as if the term of six years had been mentioned, instead of the term of ten years, in the section of the said Act numbered eighteen, and the period of twelve years had been mentioned in the said section eighteen instead of the period of twenty years; and the provisions of the Act passed in the session of the seventh year of the reign of His late Majesty King

(*k*) 32 & 33 Vict. c. 42.

(*l*) *Day v. Day*, L. R. 3 P. C. 751.

(*m*) *Pitt v. Lord Dacre*, 3 Ch. D. 295.

(*n*) *Re Peat's Trusts*, L. R. 7 Eq.

302.

(*o*) *Hay v. Gordon*, L. R. 4 P. C. 337.

(*p*) L. R. 3 P. C. 436.

(*q*) L. R. 3 P. C. 539.

(*r*) *Ante*, p. 92.

27 & 28  
 Vict. c. 57,  
**§§ 9, 11,  
 12.**

William the Fourth, and the first year of the reign of Her present Majesty, chapter twenty-eight, shall remain in full force, and be construed together with this Act, as if the period of twelve years had been therein mentioned instead of the period of twenty years.]

Short title  
 of Act of  
 1874.

[11. This Act may be cited as the "Real Property Limitation Act, 1874."]

Commencement  
 of Act of  
 1874.

[12. This Act shall commence and come into operation on the first day of January, one thousand eight hundred and seventy-nine.]

# THE STATUTES RELATING TO ILLUSORY APPOINTMENTS.

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11 Geo. 4 & 1 Will. 4, c. 46.  
37 & 38 Vict. c. 37.

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## SUMMARY.

ALL powers of appointment are either exclusive or non-exclusive. Under an exclusive power, the appointor has a discretion to appoint the whole fund to one or more of the objects of the power, to the exclusion of the others. But under a non-exclusive power, exercised before the 30th of July, 1874, he was bound to appoint a portion of the fund to every object of the power. Prior to the 16th of July, 1830, it was immaterial, at law, how small the share appointed to any object might be; but in equity it was necessary to appoint a *substantial* share to each object. As regards powers exercised after the 16th of July, 1830, the Act 11 Geo. 4 & 1 Will. 4, c. 46, intituled "An Act to alter and amend the law relating to illusory appointments," rendered illusory appointments, *i.e.*, appointments of merely nominal shares, good in equity as well as at law. The "Act to alter and amend the law as to appointments under powers not exclusive" (37 & 38 Vict. c. 37), in effect, renders every power of appointment exercised after the 30th of July, 1874, exclusive, unless there is an express declaration to the contrary in the instrument creating the power.

## 11 GEO. 4 &amp; 1 WILL. 4, c. 46.

1 Will. 4, *An Act to alter and amend the Law relating to Illusory Appointments.*<sup>1</sup>  
 c. 46,  
 § 1.

**Preamble.** WHEREAS, by deeds, wills, and other instruments, powers are frequently given to appoint real and personal property amongst several objects, in such manner that none of the objects can be excluded by the donee of the power from a share of such property:<sup>2</sup> And whereas appointments in exercise of such powers, whereby an unsubstantial, illusory, or nominal share of the property affected thereby is appointed to or left unappointed to devolve upon any one or more of the objects thereof, are invalid in equity, although the like appointments are good and binding at law:<sup>3</sup> And whereas considerable inconvenience<sup>4</sup> hath arisen from the rule of equity relative to such appointments, and it is expedient that such appointments should be as valid in equity as at law;<sup>5</sup> be it therefore enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that no appointment, which from and after the passing of this Act, shall be made in exercise of any power or authority to appoint any property, real or personal, amongst several objects, shall be invalid or impeached in equity, on the ground that an unsubstantial, illusory, or nominal share only shall be thereby appointed to or left unappointed to devolve upon any one or more of the objects of such power; but that every such appointment shall be valid and effectual in equity as well as at law, notwithstanding that any one or more of the objects shall not thereunder, or in default of such appointment, take

**Incon-  
venience of  
equitable  
rule.**

**Illusory  
appoint-  
ments to  
be valid  
in equity  
as well as  
at law.**

more than an unsubstantial, illusory, or nominal share of the property subjected to such power.<sup>6</sup>

1 Will. 4,  
c. 46,  
§ 1.

<sup>1</sup> This Act is retrospective in this sense, that it applies to powers created before, but exercised after, the 16th of July, 1830. *Per* LORD ROMILLY, M.R. (a). The old law consequently applies to all powers exercised before that date.

#### LAW PRIOR TO 1830.

<sup>2</sup> Of course, where the power was so expressed as to give the appointor a discretion to exclude any one or more of the objects—*e.g.*, “to such of my children as A. shall think fit”—no difficulty arose. Such a power was called exclusive. And a trust for “such child or children” of the marriage as the donee shall appoint, confers a non-exclusive power (b). But where the power was non-exclusive—*e.g.*, “to all and every my children, in such shares as A. shall appoint”—it was held, both at law and in equity, that some share must be appointed to every object of the power.

Exclusive  
and non-  
exclusive  
powers.

<sup>3</sup> At law the amount of the share appointed to any object was immaterial—no appointment, however small, was considered illusory (c). But in equity, the rule prior to 1 Will. 4, c. 46, is thus stated by the late MASTER OF THE ROLLS:—

Old rule  
at law.  
Rule in  
equity  
before  
1830.

“When a power was given to appoint among a class in such parts or shares as the appointor should direct, it was held, not irrationally, that the meaning of the person creating the power was that the appointor should appoint a substantial share to each object of the power” (d).

<sup>4</sup> This inconvenience arose from the fact that it became necessary for the Court in every case which came before it, to decide what amounted to a “substantial” and what to a nominal or “illusory” share—“No one knew exactly how much a substantial portion of the property was, and it was impossible to say without resorting to litigation what the least sum was, which the appointor was authorised to appoint.” *Per* JESSEL, M.R. (e).

Incon-  
venience of  
equitable  
rule.

The following are instances of appointments that were held illusory, and therefore bad: Five shillings (f); 1*l.* to one child and 1999*l.* to another (g); 5*l.* and 9*l.* out of a fund of 4000*l.* (h); 10*l.* out of a fund of nearly 1900*l.* (i); 10*l.* 10*s.* where the fund exceeded 2000*l.* (k); one acre of land part of a large estate (l).

Cases as to  
illusory  
appoint-  
ments  
before  
1830.

(a) *Reid v. Reid*, 25 B. 480.

(b) *Chamberlain v. Napier*, 15 Ch. D. 614.

(c) *Morgan v. Surman*, 1 Taunt. 289, 298.

(d) *Gainsford v. Dunn*, L. R. 17 Eq. 405, 406.

(e) *Gainsford v. Dunn*, L. R. 17

Eq. 405, 407.

(f) *Gibson v. Kinven*, 1 Ver. 66.

(g) *Lysaght v. Royse*, 2 Sch. & L. 151.

(h) *Spencer v. Spencer*, 5 Ves. 362.

(i) *Kemp v. Kemp*, 5 Ves. 849.

(k) *Vanderzee v. Aclom*, 4 Ves. 771.

(l) *Pocklington v. Bayne*, 1 Bro C. C. 450.

1 Will. 4,  
c. 46,  
**§ 1.**

On the other hand, the following appointments were held valid : 33*l.* 6*s.* 8*d.* where the fund amounted to 2500*l.* (*m*) ; 71*l.* to one object and 5500*l.* to another (*n*) ; 100*l.* to one son (an uncertificated bankrupt) and 2400*l.* to another (*o*) ; 200*l.* out of a fund exceeding 25,000*l.* (*p*).

A reversionary interest was considered an illusory share (*q*). But in deciding whether a share was illusory or not the Court would consider the circumstances of the case (*r*), and the appointment of a very small sum might be upheld if the child had been guilty of gross misbehaviour (*s*), or was otherwise provided for (*t*) either by the appointor (*u*) or *aliunde* (*x*). A power to appoint real and personal estate was well exercised by appointing real estate to some objects and personalty to the others (*y*).

<sup>5</sup> LORD ELDON, in 1812, strongly disapproved of the equitable rule, and thought that any appointment good at law ought not to be considered illusory in equity, but considered himself bound by authority. The expediency of the rule had also been questioned, on several occasions, by other judges.

#### LAW BETWEEN 1830 AND 1874.

Effect of  
the Act of  
1830.

<sup>6</sup> “The statute (*z*) made the appointment of a nominal or illusory share, which was a valid appointment at law, valid also in equity ; but it did not make that which was an invalid appointment both at law and in equity, because some of the objects were excluded, valid in equity.” *Per* CUSACK SMITH, M. R. (*Ireland*) (*a*). But the case in which this *dictum* occurs has been disapproved of by JESSEL, M. R., who held that a non-exclusive power was well exercised in 1834 by the appointment of the whole fund to all the objects of the power and the survivors or survivor of them (*b*).

“The statute requires a share, however small, to be given to each of the objects of the power.” *Per* LORD HATHERLEY, C. (*c*).

“The rule is that there must be at least a farthing payable out of the fund subject to the power ; and, as I said before, however small the

(*m*) *Mocatta v. Lousada*, 12 Ves. 123.

(*n*) *Duke v. Sylvester*, 12 Ves. 126.

(*o*) *Bax v. Whitbread*, 16 Ves. 15.

(*p*) *Butcher v. Butcher*, 9 Ves. 382 ; 1 V. & B. 79.

(*q*) *Alexander v. Alexander*, 1 Ves. Sr. 640.

(*r*) *Bax v. Whitbread*, 16 Ves. 15, 19, 21 ; *Boyle v. Bishop of Peterborough*, 1 Ves. J. 299, 310.

(*s*) *Maddison v. Andrew*, 1 Ves. Sr. 57, 59

(*t*) *Burrell v. Burrell*, 1 Amb. 660.

(*u*) *Long v. Long*, 5 Ves. 445, 448.

(*x*) *Per* LORD REDESDALE, *Lysaght v. Royse*, 3 Sch. & L. 155 ; and see *Vanderzee v. Aclom*, 4 Ves. 771, 785.

(*y*) *Morgan v. Surman*, 1 Taunt. 289.

(*z*) 11 Geo. 4 & 1 Will. 4, c. 46.

(*a*) *Minchin v. Minchin*, 3 I. Ch. R. 167, 177.

(*b*) *Re Capon's Trusts*, 10 Ch. D. 484.

(*c*) L. R. 6 Ch. 162.

sum appointed may be, the appointment cannot be objected to as illusory." *Per* JESSEL, M. R. (d). 1 Will. 4,  
c. 46,  
§ 1.

Accordingly, the appointment of a square yard of real estate to one object of a power and of lands of great value to another has been held good (e).

And where a person having a non-exclusive power to appoint among a class of five persons, bequeathed to two of them a legacy of 5*l.* each, and to the other three all the rest and residue of her property and over which she had a power of appointment, it was held that the legacies of 5*l.* were charged upon the property subject to the power, as well as on the appointor's own estate, and that the appointment was good (f). Cases since  
1830.

But an appointment of the income of a fund to the children successively for life was held not a good exercise of a power to appoint to all and every the children of A. A share of the capital ought to have been given to each (g). And *semble* that the appointment of a contingent interest is not sufficient (h). And where some of the objects of a non-exclusive power were omitted, the whole appointment was held bad (i).

The principles laid down in the above cases govern all powers of appointment exercised between the 16th of July, 1830, and the 30th of July, 1874. Those exercised after the latter date are governed by 37 & 38 Vict. c. 37, the title and preamble of which are as follows:—

*An Act to alter and amend the Law as to Appointments  
under powers not exclusive.*

[WHEREAS by deeds, wills, and other instruments, powers are frequently given to appoint real and personal property amongst several objects in such manner that no one of the objects of the power can be excluded, or some one or more of the objects of the power cannot be excluded by the donee of the power from a share of such property, but without requiring a substantial share of such property to be given to each object of the power, or to each object of the power who cannot be excluded.<sup>1</sup> 37 & 38  
Vict. c. 37,  
Preamble.

And whereas instruments intended to operate as executions of such powers are frequently invalid in consequence of the donee of the power appointing in favour of some one Invalidity  
of appoint-  
ments  
under non-  
exclusive  
powers.

(d) *Gainsford v. Dunn*, L. R. 17 Eq. 409.

(e) *Re Stone's Estate*, L. R. 3 Eq. 62.

(f) *Gainsford v. Dunn*, L. R. 17 Eq. 405.

(g) *Lloyd v. Laver*, 14 Sim. 645.

(h) *Minchin v. Minchin*, 3 L. Ch. R. 167—177; and compare *Alexander v. Alexander*, 1 Ves. Sr. 640.

(i) *Bulkeel v. Plummer*, L. R. 6 Ch. 160.



1 Will. 4,  
c. 46,  
§ 1.  
37 & 38  
Vict. c. 37,  
Preamble.

or more of the objects of the power to the exclusion of the other or others, or some other or others of such objects,<sup>2</sup> and it is expedient to amend the law so as to prevent such intended appointments failing:  
Be it therefore enacted, &c.]

<sup>1</sup> See note <sup>6</sup> to 1 Will. 4, c. 46, s. 1 (*k*).

It frequently happened that an appointor omitted, by mistake or otherwise, to appoint a nominal sum to such of the objects of the power as he did not wish to benefit, and the whole appointment consequently failed. This led to the passing of the Act of 1874 (*l*), s. 1 of which is as follows:—

#### LAW SINCE 1874.

37 & 38  
Vict. c. 37,  
§ 1.

Appoint-  
ments to  
be valid  
notwith-  
standing  
one or  
more ob-  
jects ex-  
cluded.

[1. That no appointment, which, from and after the passing of this Act,<sup>1</sup> shall be made in exercise of any power to appoint any property, real or personal, amongst several objects, shall be invalid at law or in equity on the ground that any object of such power has been altogether excluded, but every such appointment shall be valid and effectual notwithstanding that any one or more of the objects shall not thereby or in default of appointment take a share or shares of the property subject to such power.]

<sup>1</sup> Of course this section applies only to instruments executed after the passing of the Act (30th July, 1874) (*m*).

Effect of  
the Act of  
1874.

The practical effect of this section is to render all powers of appointment exercised after that date, exclusive, unless the instrument creating the power contains an express declaration to the contrary. See s. 2 of 1 Will. 4, c. 46, and s. 2 of 37 & 38 Vict. c. 38, which are as follows:—

#### ACTS MAY BE EXCLUDED.

1 Will. 4,  
c. 46,  
§ 2.

2. Provided always, and be it further enacted, that nothing in this Act contained shall prejudice or affect any provision in any deed, will, or other instrument creating any such power as aforesaid, which shall declare the amount of

(*k*) *Ante*, p. 104.  
(*l*) 37 & 38 Vict. c. 37.

(*m*) *Moynan v. Moynan*, 1 L. R. Ir. 382.

the share or shares from which no object of the power shall be excluded.<sup>1</sup>

1 Will. 4,  
c. 46,  
§ 2.

<sup>1</sup> See note to s. 2 of 37 & 38 Vict. c. 37, which is as follows:—

[2. Provided always, and be it enacted, that nothing in this Act contained shall prejudice or affect any provision in any deed, will, or other instrument creating any power, which shall declare the amount or the share or shares from which no object of the power shall be excluded, or some one or more object or objects of the power shall not be excluded.<sup>1</sup>]

37 & 38  
Vict. c. 37,  
§ 2.

Not to  
affect any  
power  
which de-  
clares the  
amount of  
the share.

<sup>1</sup> The following remark of LORD ST. LEONARDS applies to powers under the Act of 1874, as well as under the Act of 1830.

“Where it is intended that a party shall have power to divide the fund amongst several objects in *substantial* proportions, according to his discretion, but shall not be at liberty to give a merely nominal share to any, the smallest sum which the person creating the power would wish each of the objects, in any event, to have, should be named; and it should be declared that the donee of the power shall not be at liberty to appoint any less sum to any of the objects” (n).

3. Provided also, and be it further enacted and declared, that nothing in this Act contained shall be construed, deemed, or taken, at law or in equity, to give any other validity, force, or effect to any appointment, than such appointment would have had if a substantial share of the property affected by the power had been thereby appointed to or left unappointed to devolve upon any object of such power.

1 Will. 4,  
c. 46,  
§ 3.

Not to  
validate  
powers  
otherwise  
bad.

# THE PARTITION ACT, 1868,

AS AMENDED BY

## THE PARTITION ACT, 1876.

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31 & 32 Vict. c. 40.  
39 & 40 Vict. c. 17.

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### SUMMARY.

THE object of the Partition Acts, 1868 and 1874, is to enable the Court to give judgment for a sale of real estate to which several persons are entitled, instead of partition. Before 1868 this could not be done except with the consent of all persons entitled, however many they might be, and however inconvenient—or even physically impossible—a partition might be from the nature of the property. The effect of ss. 2 and 12 of the Partition Act, 1868, together with the Judicature Acts (England and Ireland), is to confer the jurisdiction under these Acts as to land in England upon the Chancery Division of the High Court of Justice in England, and also upon County Courts in England where the value of the land does not exceed £500: and as to land in Ireland upon the Chancery Division of the High Court of Justice in Ireland.

Sect. 3 of the Act of 1878 enables the Court to order a sale at the request of a minority where a sale will be more beneficial than a partition, while s. 4 has been held to make it compulsory for the Court to order a sale where the owners of not less than half the property ask for it.

Under s. 5 of the same Act the Court may, at its discretion, order a sale at the instance of any person interested, however small his interest, unless the other persons interested offer to buy his share.

Any person who might have maintained a suit for partition may, under s. 9 of the Act of 1868, commence an action for sale, and s. 7 of the Act of 1874 provides that he need not claim partition as well as sale, while s. 6 of the same Act enables a request for sale or an undertaking to purchase to be made or given on behalf of persons under disability. Sect. 6 of the Act of 1868 enables the Court to allow persons interested to bid, and s. 7 of the same Act incorporates s. 30 of the Trustee Act, 1850, so as to enable the Court to make a vesting order where necessary. Sect. 8 incorporates the provisions of ss. 23 to 25 of the Settled Estates Act, 1856, as to investment of the proceeds of sale. If all the persons interested are not parties, they must be served with the judgment, unless the Court dispenses with service on any of them under s. 3 of the Act of 1874. In this case the proceeds of sale must be paid into Court, and notice be given by advertisement or otherwise, pursuant to s. 4 of the Act of 1874, of the time fixed for the distribution thereof. The same section empowers the Court to distribute the fund among those whose claims to participate are established, to the exclusion of all other persons. But s. 5 of the same Act in effect provides that if on any subsequent sale a person excluded under a previous sale shall establish his right to participate, the shares of the other persons in the proceeds of such subsequent sale shall abate to the extent to which they were increased by his exclusion on the occasion of the prior sale.

Sect. 10 of the Act of 1868 gives the Court a discretion as to costs, and s. 11 confers a power of making rules, which has not been exercised.

## 31 &amp; 32 VICT. c. 40.

*An Act to amend the law relating to partition.*

31 & 32  
Vict. c. 40,  
§ 1.

Be it enacted, &c.

1. This Act may be cited as the Partition Act, 1868.<sup>1</sup>

Title of  
Act of  
1868.

<sup>1</sup> This Act was amended by the Partition Act, 1876 (a), of which the title and ss. 1 and 2 are as follows:—

*An Act to amend the Partition Act, 1878.*

39 & 40  
Vict. c. 17,  
§§ 1, 2.

Applies to  
pending  
actions.

[1. This Act may be cited as the Partition Act, 1876, and shall be read as one with the Partition Act, 1868.]

[2. This Act shall apply to actions pending at the time of the passing of this Act<sup>2</sup> as well as to actions commenced after the passing thereof, and the term “action” includes a suit, and the term “judgment” includes a decree or order.]

<sup>2</sup> The Act of 1868 was held to be so far retrospective as to authorise a sale in a suit already commenced (b), if a decree for partition had not been made (c).

31 & 32  
Vict. c. 40,  
§ 2.

Meaning  
of “the  
Court.”

2. In this Act the term “the Court” means the Court of Chancery in England,<sup>1</sup> the Court of Chancery in Ireland,<sup>2</sup> the Landed Estates Court in Ireland,<sup>2</sup> and the Court of Chancery of the County Palatine of Lancaster, within their respective jurisdictions.

<sup>1</sup> By s. 16 of the Judicature Act, 1873 (d), the jurisdiction previously exercised by the High Court of Chancery in England was transferred to and vested in the High Court of Justice; and by s. 34 all causes or matters for the partition of real estates were assigned to the Chancery Division.

<sup>2</sup> Similar provisions with regard to Ireland are made by ss. 21 and 36 of the Judicature Act (Ireland), 1877 (e).

(a) 39 & 40 Vict. c. 17.

(b) *Lys v. Lys*, L. R. 7 Eq. 126.

(c) *Pryor v. Pryor*, L. R. 19 Eq. 595;

L. R. 10 Ch. 469.

(d) 33 & 37 Vict. c. 66.

(e) 40 & 41 Vict. c. 57.

## COURT MAY ORDER SALE WHERE BENEFICIAL.

3. In a suit for partition, where, if this Act had not been passed, a decree for partition might have been made, then if it appears to the Court<sup>1</sup> that, by reason of the nature of the property<sup>2</sup> to which the suit relates, or of the number of the parties interested<sup>3</sup> or presumptively interested therein, or of the absence or disability of some of those parties, or of any other circumstance,<sup>4</sup> a sale of the property and a distribution of the proceeds would be more beneficial<sup>5</sup> for the parties interested than a division of the property between or among them, the Court may, if it thinks fit, on the request<sup>6</sup> of any of the parties interested, and notwithstanding the dissent or disability of any others of them, direct a sale of the property accordingly, and may give all necessary or proper consequential directions.<sup>7</sup>

81 & 82  
Vict. c. 40,  
§ 3.

Court may  
order sale  
where  
beneficial.

<sup>1</sup>“The 3rd section gives power for the Court to sell for certain reasons. Effect of . . . . It is an absolute power of sale on the request of anybody, s. 3. provided the Court is satisfied that it would be more beneficial for the parties interested than a division.” *Per* JESSEL, M. R. (f).

“The Court is at liberty at the request of a person holding one-tenth, and against the wish of the persons holding the other nine-tenths, to order a sale, if from the nature of the property or from the number of the persons interested the Court thinks it right and reasonable to do so.” *Per* LORD HATHERLEY, C. (g).

Where a sale was opposed by the majority, WICKENS, V.-C., held that the *onus* was on the minority to show that a sale would be beneficial. “In order to do this,” he continued, “they must show that the majority were perverse, or had mistaken their interest in wishing for a partition, and if that could not be done—and they had not done so—the Court ought not to order a sale against the wish of the majority” (h).

The fact that a tenant in common has acquired the legal estate in the entirety by taking a transfer of a mortgage will not prevent the Court from ordering a sale shewn to be beneficial (i).

<sup>2</sup> An order has been made for partition of part of an estate, and sale of the rest; in one case it appears to have been by consent (k); but in other cases the Court was guided by the nature of the property. In one case

Nature of  
the pro-  
perty.

(f) *Drinkwater v. Ratcliffe*, L. R. 20 Eq. 528—531.

(g) *Pemberton v. Barnes*, L. R. 6 Ch. 685—694.

(h) *Allen v. Allen*, 21 W. R. 842.

(i) *Waite v. Bingley*, 21 Ch. D. 674.

(k) *Roebuck v. Chadebert*, L. R. 8 Eq. 127.

31 & 32  
Vict. c. 40,  
§ 3.

the property consisted of several distinct estates—some being large and others small—in which more than sixty persons were interested (*l*); and in another case the property consisted of several houses, and a sale was opposed by the majority of persons interested (*m*).

Number of  
persons  
interested.

<sup>3</sup> Where property was divisible in thirteenths among four persons resident in England and nine resident in Australia (some being under disability), the Court ordered a sale (*n*).

And property in which infants were interested was ordered to be sold, although their testator had directed that no sale should take place during their minorities. In this case the property had been used for the purposes of a business, which had been removed elsewhere; and there was no probability of obtaining a good rent on a short lease (*o*).

Where nine persons were entitled in thirty-sixth shares to property consisting of a farmhouse with twenty-five acres of freehold and five acres of copyhold land, it was held to be a proper case for a sale, both on account of the nature of the property and the number of the parties interested (*p*).

Where the owners of three-sixteenths of five messuages desired a sale, the Court ordered one, but allowed all parties, except those having the conduct thereof, to bid (*q*).

Where a testator directed a sale of real estate on the death of a tenant for life, the Court refused to direct a sale during his life at the request of tenants in common in remainder (*r*).

Where land was devised to X for life, with an executory devise to all his children, the Court refused to direct a sale during the life of X, inasmuch as other children might be born and become entitled. If a sale had been necessary, *semble* that it could have been ordered under R. S. C. 1883, Ord. LI. R. 1. (*s*).

<sup>4</sup> See notes to s. 5, p. 115, *post*.

Meaning  
of "bene-  
ficial"

<sup>5</sup> "What does that mean? It means in a pecuniary sense. I cannot go into questions of sentiment, I must look to the monetary results." *Per* JESSEL, M. R. (*t*). It means beneficial generally and not necessarily beneficial to every individual interested. *Per* DENMAN, J. (*u*). Where it is intended to ask for a sale under this section, the fact that a sale will be more beneficial than a partition should

(*l*) *Pennington v. Dalbiac*, 18 W. R. 684.

(*m*) *Allen v. Allen*, 21 W. R. 842.

(*n*) *Acton v. Meredith*, L. R. 11 Eq. 602.

(*o*) *Thompson v. Richardson*, L. R. 6 Eq. 596—598.

(*p*) *Drinkwater v. Ratcliffe*, L. R. 20 Eq. 528—532—3.

(*q*) *Gilbert v. Smith*, 11 Ch. D. 78; *Pitt v. Jones*, 5 Ap. Ca. 651; *Verrall v. Cathcart*, 27 W. R. 645. Compare

*Fleming v. Crouch*, W. N. 1884, p. 111.

(*r*) *Swaine v. Denby*, 14 Ch. D. 326.

See and compare, *Taylor v. Grange*, 15 Ch. D. 165, and *Biggs v. Peacock*, 20 Ch. D. 200, 22 Ch. D. 284.

(*s*) *Miles v. Jarvis*, W. N. 1883, p. 203.

(*t*) *Drinkwater v. Ratcliffe*, L. R. 20 Eq. 528—533.

(*u*) *Fleming v. Crouch*, W. N. 1884, p. 111.

be pleaded. *Per* KAY, J. (v). And see R. S. C. 1883, Ord. XIX., r. 4, 31 & 32  
and Form 13 in Appendix C thereto. Vict. c. 40,

<sup>6</sup> As to who may "request" a sale, see s. 6 of the Act of 1876, and § 3.  
notes thereto (w).

<sup>7</sup> As to proceedings at the hearing in London and the directions then  
given, see s. 9 of the Act of 1868, and notes thereto (x).

"The meaning of the Legislature was, that when you see that the  
property is of such a character that it cannot be reasonably partitioned,  
then you are to take it as more beneficial to sell it and divide the money  
among the parties." *Per* JESSEL, M. R. (y).

## OWNERS OF MOIETY—RIGHT TO A SALE.

4. In a suit for partition, where, if this Act had not 31 & 32  
been passed, a decree for partition might have been made, Vict. c. 40,  
then if the party or parties interested, individually or col- § 4.  
lectively, to the extent of one moiety<sup>1</sup> or upwards in the Owners of  
property to which the suit relates, request the Court to a moiety  
direct a sale of the property and a distribution of the may re-  
proceeds instead of a division of the property between or quire a  
among the parties interested, the Court shall, unless it sees sale in the  
good reason to the contrary,<sup>2</sup> direct a sale of the property absence of  
accordingly, and give all necessary or proper consequential good rea-  
directions. son to the  
contrary.

<sup>1</sup> "The scope of the enactment appears to me to be this: there being, Effect of  
as I have said, reasons which may induce some of the part owners to s. 4.  
wish for a partition, and others to wish for a sale and a division of the  
proceeds, the Legislature says that if the votes are equally divided, one  
half of the persons interested in the property desiring a sale, and the  
other half a partition, then the half requiring the sale shall have the  
preponderating voice, and the Court shall be bound to give them a sale,  
wholly irrespective of the 3rd section. But still there is a certain  
discretion left to the Court, so that the Court can refuse a sale when it  
is manifestly asked for through vindictive feeling, or is on any other  
ground unreasonable. If we then look to the 5th section, we shall see  
how any injustice is guarded against by an enactment which, I think,  
applies to the 3rd and 4th sections." *Per* LORD HATHERLEY, C. (z).

In a recent case before the House of Lords (a), LORD HATHERLEY

(v) *Evans v. Evans*, 31 W. R. 495.

*Jones*, 5 Ap. Ca. 651.

(w) P. 118, *post*.

(z) *Pemberton v. Barnes*, L. R. 6

(x) P. 124, *post*.

Ch. 685—693.

(y) *Gilbert v. Smith*, 11 Ch. D. 81;  
affirmed in H. L. *sub. nom. Pitt v.*

(a) *Pitt v. Jones*, 5 Ap. Ca. 655.



31 & 32 reconsidered and affirmed the view previously expressed by him, that  
 Vict. c. 40, ss. 3 and 4 are qualified by s. 5; but he was overruled by LORD BLACK-  
 § 4. BURN and LORD WATSON, who were of a different opinion.

See also notes to s. 5 (b).

The Act throws the burden of proof upon the tenant in common who resists sale and claims partition (c).

"The parties interested to the extent of one moiety are entitled to a sale as of right, unless there is some good reason to the contrary shown; they have not to show any reason for the sale, but a reason to the contrary must be shown." *Per* JESSEL, M. R. (d).

Mortgagees are "parties interested" under this section and s. 3 (e).

What is good reason to the contrary.  
 2 The fact that a sale may possibly diminish the income of an infant presumptively entitled to a moiety of the property is not "good reason to the contrary" (f).

Nor is the fact that the owner of a moiety is yearly tenant of and carries on business upon the entirety of the property (g).

Nor the fact that the property consists of a large landed estate or a mansion house, derived by the plaintiff and defendant from a common ancestor, coupled with the desire of either party to keep his moiety in the family (h); even though the property may be almost surrounded by, and have been usually occupied with, other property of which one party is tenant for life; especially if the other party wishes to buy the whole of the property (i).

And of course the mere dissent of a minority is not *per se* "good reason to the contrary," though it may largely enter into the consideration of what is such reason (j).

But where the owner of a moiety of nineteen leasehold houses, held under separate leases, desired a sale, which would cause loss to the defendant, although a partition would cause no loss to himself, and could be easily effected, the Court held, that "good reason to the contrary" had been shewn and ordered a partition (k).

And although the existence of a mere power of sale at the request of a majority of the persons interested does not oust the jurisdiction of the Court (l) there is no jurisdiction to direct a sale or partition of property over which there is a subsisting trust for sale at the discretion of trustees. Although the tenant for life and remaindermen who have

(b) P. 116, *post*.

(c) *Pemberton v. Barnes*, L. R. 6 Ch. 693; *Wilkinson v. Joberns*, L. R. 16 Eq. 14

(d) *Drinkwater v. Ratcliffe*, L. R. 20 Eq. 528—531; *Roughton v. Gibson*, 46 L. J. Ch. 366.

(e) *Davenport v. King*, 31 W. R. 911.

(f) *Rowe v. Gray*, 5 Ch. D. 263.

(g) *Wilkinson v. Joberns*, L. R. 16 Eq. 14.

(h) *Pemberton v. Barnes*, L. R. 6 Ch. 685—694.

(i) *Porter v. Lopes*, 7 Ch. D. 358.

(j) *Re Langdale*, L. R. 6 Eq. 572—574.

(k) *Saxton v. Bartley*, 27 W. R. 615; 48 L. J. Ch. 579.

(l) *Boyd v. Allen*, 31 W. R. 554.

attained a vested interest in one moiety may desire a sale, the remaindermen entitled to the other moiety have a right to call upon the trustees to execute the trust (*m*). 31 & 32  
Vict. c. 40,  
§ 4.

## PURCHASE OF SHARE IN LIEU OF SALE.

5. In a suit for partition, where, if this Act had not been passed, a decree for partition might have been made, then if any party interested in the property to which the suit relates requests<sup>3</sup> the Court to direct a sale of the property and a distribution of the proceeds instead of a division of the property between or among the parties interested, the Court may, if it thinks fit,<sup>1</sup> unless the other parties interested in the property, or some of them, undertake to purchase the share of the party requesting a sale,<sup>2</sup> direct a sale of the property, and give all necessary or proper consequential directions, and in case of such undertaking being given the Court may order a valuation of the share of the party requesting a sale in such manner as the Court thinks fit, and may give all necessary or proper consequential directions. 31 & 32  
Vict. c. 40,  
§ 5.  
Court may order sale unless parties opposing will purchase share of party requesting a sale.

This section has given rise to considerable difference of judicial opinion, but the question whether or not it qualifies the provisions of ss. 3 and 4 has now been decided in the negative by the House of Lords (*n*).

In an early case, LORD HATHERLEY, C., affirming MALINS, V.-C., expressed an opinion that it was a limitation of the powers conferred by ss. 3 and 4. On the other hand, JESSEL, M. R., considered that s. 5 confers an absolute right to a sale, quite independently of s. 3, on any part owner, however small his interest, unless the other part owners, or some of them, are able and willing to purchase such interest. s. 5.

The following extracts from the judgments in which these opinions were expressed may be profitably compared:—

“If we then look to the 5th section, we shall see how any injustice is guarded against by an enactment which, I think, applies to the 3rd and 4th sections. Here a wide discretion is given to the Court. The Court may think that a sale under the 3rd or 4th section is rather Opinion of Lord Hatherley.

(*m*) *Biggs v. Peacock*, 20 Ch. D. 200; 22 Ch. D. 284. Compare *Swain v. Denby*, 14 Ch. D. 326.  
(*n*) *Pitt v. Jones*, 5 Ap. Ca. 651.

31 & 32  
 Vict. c. 40,  
 § 5.

hard upon the parties who are very anxious not to have a sale; and if they come forward and undertake to buy the share of the party who requests a sale, the Court can give them liberty to do so. . . . The case therefore stands thus:—(a) The Court is *at liberty*, at the request of a person holding one-tenth and against the wish of the persons holding the other nine-tenths, to order a sale, if from the nature of the property or from the number of the persons interested the Court thinks it right to do so. (b) If the Court finds that the parties entitled to a moiety or upwards desire a sale, the Court *must order it*, unless some good reason is shown to the contrary, or *unless the persons objecting to a sale offer to purchase* the shares of the parties desiring it, in which case the Court has a discretion to authorise them to do so.” *Per* LORD HATHERLEY, C. (o).

Opinion of  
 Jessel,  
 M.R.

“Where the Court sees no reason at all, still any party interested may apply, and then there is a limit imposed, and the limit is this: that the Court shall not exercise the new power given by the 5th section, which depends entirely upon the caprice of the party asking, *without any opinion of the Court being expressed*, if other people will buy. That is a check upon the new power, not as it has been supposed to be, a limitation of the 3rd and 4th sections, but it is a new power given to any party, whether plaintiff or defendant, to apply, with or without any reason whatever, to the Court for a sale, and *he is entitled to ask for it*, unless somebody is going to buy; and then *Williams v. Games* says that if he does apply for it, and somebody does offer to buy his share, he may withdraw his request. That is my view of the law, and considering that *Williams v. Games* is the last decision, I think I am entitled to express that view as one that ought to guide me in future, unless corrected, notwithstanding observations of Lord Hatherley in the case of *Pemberton v. Barnes*, which seems to point to the conclusion that the 5th section was in the nature of a proviso to the following effect:—*Provided always, that no sale shall be directed under the 3rd and 4th sections of this Act if any other party interested shall undertake to buy the share of the parties asking for sale.* That appears to me contrary to the plain meaning of the words of the 5th section. . . . Therefore, under the 5th section *the parties applying are entitled to a sale.*” *Per* JESSEL, M. R. (p).

It has now been decided by the House of Lords (LORD HATHERLEY dissenting), that s. 5 does not qualify or restrict the provisions of ss. 4 and 5. Any party who can bring himself within s. 3 or s. 4 may press for a sale notwithstanding an offer to purchase his share (q). The

(o) *Pemberton v. Barnes*, L. R. 6 20 Eq. 528—531—2.  
 Ch. 685—693, 694.

(q) *Pitt v. Jones*, 5 Ap. Ca. 651.

(p) *Drinkwater v. Ratcliffe*, L. R.

writer is not aware of any case not coming within s. 3 or s. 4 in which a sale has been ordered under s. 5; and, therefore, the question what is the true construction of that section may fairly be considered as still open to discussion. The following remarks on this subject appeared in the first edition:—

31 & 32  
Vict. c. 40,  
§ 5.

“The wording of the whole section is opposed to the view of LORD HATHERLEY: the fact that ss. 3, 4, and 5 all commence with the same words, would lead to the inference that each was intended to confer a separate power, and if s. 5 was merely intended to limit the powers given by the two previous sections, such intention would have been more accurately and clearly expressed by a short negative proviso to the effect of that printed above in italics.

Observa-  
tions on  
the effect  
of s. 5.

“On the other hand, it is difficult to reconcile the view of SIR G. JESSEL with the actual words of the section: it should be observed that (a) under s. 3, the Court *may if it thinks fit*, under certain circumstances, (β) under s. 4, the Court *shall*, unless reason to the contrary be shown, and (γ) under s. 5, the Court *may if it thinks fit*, unless certain things are done, direct a sale. To hold that “under s. 5 the parties applying are *entitled to a sale*” (r), unless an offer is made to purchase their shares, in cases “where the Court sees no reason for preferring a sale to a partition” (s), is equivalent to saying that the Court shall think a sale fit in all cases where no offer to purchase is made. This would practically have the effect of taking away from the Court all discretion to refuse a sale under s. 3; for every party who had failed to make out a case under that section would be at liberty to claim a sale, as of right, under s. 5. It is true that the other parties might intervene with an offer to purchase; but it would depend upon them, and not upon the opinion of the Court, whether, in any case, a sale should be prevented.”

That the Court was intended to have and exercise a discretion under ss. 3 and 5 is clear from the express words of those sections, and this was recognised by WICKENS, V.-C., in a case (t) which is cited in the notes to s. 3 (u), and which has not, it is believed, been either questioned or overruled. It was laid down by that learned judge that unless such a course was shewn to be beneficial “the Court ought not to order a sale against the wish of the majority.”

In *Pitt v. Jones*, the case was held to fall within s. 3, and therefore it was not necessary to decide what is the precise effect of s. 5; but the following remarks by LORD BLACKBURN are worthy of note:—“I think it means that if a party presses for a sale, and the Court thinks that the opposing parties in fairness ought either to buy him out or consent to a sale, it may order a sale unless they will agree to take his

(r) L. R. 20 Eq. 532.  
(s) *Ibid.* 531.

(t) *Allen v. Allen*, 21 W. R. 842.  
(u) *Ante*, p. 112.

31 & 32 share at a valuation, in which case the party requesting a sale may  
 Vict. c. 40, either accept that valuation or not. If he does not choose to accept that  
 § 5. valuation, he cannot be forced to do so; but will then have his common  
 law right to a partition.

Party asking for sale not compelled to sell his share only. "It is clear that the Act was intended for the benefit of those part owners who want a sale, in which case the other parties interested who object to a sale may be *compelled to buy* the shares or have a sale. But there is nothing to compel a man to *sell* his share." And a plaintiff who does not wish to sell his share under s. 5, "may, on being put to such terms, withdraw his request for a sale, and have a partition." *Per JAMES, L.J. (x)*. Or in other words, the party asking for a sale has an option, but is not compellable to accept a valuation if offered to him (y).

This case appears, at first sight, to accord with the view expressed in *Drinkwater v. Ratcliffe*, but the precise point as to a right to a sale did not arise on appeal in *Williams v. Games*; and the *dictum* that parties who object to a sale *may* be compelled to buy the shares or have a sale must be read with the qualification in the section *if the Court shall think fit*. Compare the cases cited under s. 3 (z), where a sale of part of the property and a partition of the rest, has been ordered.

#### WHO MAY REQUEST A SALE.

In order to remove doubts which arose as to the powers of persons under disability to request a sale or give an undertaking to purchase, under ss. 3, 4, and 5 of the Act of 1868, it was provided by s. 6 of the Partition Act, 1876, as follows:—

39 & 40  
 Vict. c. 17,  
 § 6.

Persons under disability may request a sale, or undertake to purchase.

[6. In an action for partition a request for sale<sup>1</sup> may be made or an undertaking to purchase<sup>2</sup> given on the part of a married woman, infant, person of unsound mind, or person under any other disability, by the next friend, guardian, committee in lunacy (if so authorised by order in lunacy), or other person authorised to act on behalf of the person under such disability, but the Court shall not be bound to comply with any such request or undertaking on the part of an infant unless it appear that the sale or purchase will be for his benefit.]

<sup>1</sup> It had previously been held that a request for a sale might be made

(x) *Williams v. Games*, L. R. 10 Ch. 204—5.

(y) *Pitt v. Jones*, 5 Ap. Ca. 651.  
 (z) *Ante*, p. 112.

by an infant (a), and by a *feme covert* (b) (who must, however, be separately examined as to her consent) (c), but not by a person of unsound mind by his or her next friend (d). Of course a person of unsound mind can now, by his next friend, commence an action and request a sale (e). 39 & 40  
Vict. c. 17,  
§ 6.

<sup>2</sup> On the other hand, it had been held that an undertaking to purchase could not be given by a *feme covert* (f); and this decision was probably the cause of the new enactment.

Under this section it was held by MALINS, V.-C., that a request for sale by an infant could only be made through a testamentary guardian, or guardian appointed by the Court (g). On the other hand, JESSEL, M. R., held that such a request may be made by the next friend or guardian *ad litem* of an infant (h). And this is now the practice of the Court.

A request by a married woman may be made by her counsel if duly authorised (i), but the mere fact that he appears as counsel for her is not sufficient evidence of authority (k). There should be a request in writing signed by her authorising and instructing her solicitor to instruct counsel to ask for a sale (l). And it is conceived that the necessity for such a request in writing is not obviated by ss. 1 and 12 of the Married Women's Property Act, 1882 (m).

Leave was given for the committee of a lunatic to request in a partition action a sale of land of an undivided share in which the lunatic was tenant in tail, and to join in conveying the property: The purchase money to be subject to the same uses as the land would have been if unsold (n).

A sale may be requested by incumbrancers of persons beneficially interested as tenants in common in the equity of redemption of certain shares, as against the persons so interested (o). It will be convenient to insert here s. 7 of the Partition Act, 1876, which is as follows:—

(a) *Young v. Young*, L. R. 13 Eq. 175, n.; *France v. France*, L. R. 13 Eq. 173; *Higgs v. Dorkis*, L. R. 13 Eq. 280; *Grove v. Comyn*, L. R. 18 Eq. 387; *Davey v. Wiellisbach*, L. R. 15 Eq. 269.

(b) *Higgs v. Dorkis*, L. R. 13 Eq. 280; *Sherratt v. Sherratt*, 21 W. R. 572.

(c) *Leigh v. Edwards*, 21 W. R. 835.

(d) *Halfhide v. Robinson*, L. R. 9 Ch. 373.

(e) *Watt v. Leach*, 26 W. R. 475.

(f) *Drinkwater v. Ratcliffe*, L. R. 20 Eq. 528—532.

(g) *Platt v. Platt*, 28 W. R. 533.

(h) *Rimington v. Hartley*, 14 Ch. D. 631.

(i) *Crooks v. Whitworth*, 10 Ch. D. 289.

(k) *Wallace v. Greenwood*, 14 Ch. D. 362.

(l) *Grange v. White*, 18 Ch. D. 612.

(m) 45 & 46 Vict. c. 75.

(n) *Re Pares, Lillington v. Pares*, 12 Ch. D. 333; 28 W. R. 193; 42 L. T. 574.

(o) *Davenport v. King*, 31 W. R. 911.

## CLAIM FOR PARTITION UNNECESSARY.

39 & 40,  
Vict. c. 17,  
§ 7.

Partition  
need not  
be claimed  
where sale  
desired.

[7. For the purposes of the Partition Act, 1868, and of this Act, an action for partition shall include an action for sale and distribution of the proceeds, and in an action for partition it shall be sufficient to claim a sale<sup>1</sup> and distribution for the proceeds, and it shall not be necessary to claim a partition.]

<sup>1</sup> This section settles the law in accordance with the view of BACON, V.-C. (*p*). It had been held by LORD ROMILLY, M. R. (*q*), and WICKENS, V.-C. (*r*), that a partition must be asked for even when a sale only was desired. This view was based on the opening words of ss. 3, 4, and 5 of the Act of 1868.

## SALE—LEAVE TO BID.

31 & 32  
Vict. c. 40,  
§ 6.

Parties  
interested  
may be  
allowed to  
bid.

6. On any sale under this Act the Court may, if it thinks fit, allow any of the parties interested in the property to bid at the sale, on such terms as to non-payment of deposit, or as to setting off or accounting for the purchase money or any part thereof instead of paying the same, or as to any other matters, as to the Court seem reasonable.

Where the owner of a moiety of property consisting of a brickfield, cottage, wharves, and valuable substrata of minerals, occupied and carried on business as a brick and tile maker upon the entirety, liberty was given for him to bid, and in the event of his becoming the purchaser he was only to be required to pay into Court half the purchase money (*s*). And all parties interested in a large estate consisting of several distinct properties were allowed to bid, including persons having the conduct of the sale (*t*).

In a subsequent case leave to bid was given to all parties, *except those having the conduct of the sale* (*u*). The same course was subsequently adopted by the House of Lords (*x*).

(*p*) *Aston v. Meredith*, L. R. 11 Eq. 601.

(*q*) *Teal v. Watts*, L. R. 11 Eq. 213.

(*r*) *Holland v. Holland*, L. R. 13 Eq. 406.

(*s*) *Wilkinson v. Joberns*, L. R. 16 Eq. 14–18.

(*t*) *Pennington v. Dalbiac*, 18 W. R. 684. See also *Porter v. Lopes*, 7 Ch. D. 358.

(*u*) *Verrall v. Cathcart*, 27 W. R. 645.

(*x*) *Pitt v. Jones*, 5 Ap. Ca. 651.



SECT. 30 OF TRUSTEE ACT, 1850.

7. Sect. 30 of the Trustee Act, 1850,<sup>1</sup> shall extend and apply to cases where, in suits for partition, the Court directs a sale instead of a division of the property.

31 & 32  
Vict. c. 40  
§ 7.

<sup>1</sup> This section is as follows:—

[30. And be it enacted, that where any decree shall be made by any Court of equity for the specific performance of a contract concerning any lands, or for the partition or exchange of any lands, or generally when any decree shall be made for the conveyance or assignment of any land, either in cases arising out of the doctrine of election or otherwise, it shall be lawful for the said Court to declare that any of the parties to the said suit,<sup>1</sup> wherein such decree is made are trustees of such lands or any part thereof, within the meaning of this Act, or to declare concerning the interests of unborn persons<sup>2</sup> who might claim under any party to the said suit, or under the will or voluntary settlement of any person deceased who was during his lifetime a party to the contract or transactions concerning which such decree is made, that such interests of unborn persons, or the interests of persons, who, upon coming into existence, would be trustees within the meaning of this Act, and thereupon it shall be lawful for the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, as the case may be, to make such order or orders as to the estates, rights, and interests of such persons born or unborn as the said Court or the said Lord Chancellor might, under the provisions of this Act, make concerning the estates, rights, and interests of trustees born or unborn.]

Sect. 30 of  
Trustee  
Act, 1850,  
incor-  
porated.

13 & 14  
Vict. c. 40,  
§ 30.

Court may  
declare  
parties and  
unborn  
persons  
trustees  
in certain  
cases, and  
make  
orders as  
to their  
interests.

<sup>1</sup> A lunatic who was entitled to an undivided share was declared a trustee, and a vesting order was made in respect of his share (*y*); but in

Lunatic  
declared  
trustee.

(*y*) *Re Molyneux*, 10 W. R. 512.



31 & 32 another case the committee of a lunatic was directed to execute all  
 Vict. c. 40, necessary assurances (z).

§ 7. <sup>2</sup> Parties to a suit were declared trustees, and the interests of unborn  
 13 & 14 persons were declared to be interests of persons who, on coming into  
 Vict. c. 40, existence, would be trustees, in a case where the title was very compli-  
 § 30. cated, and had been proved at great expense (a).

Unborn persons and right heirs declared trustees.  
 A similar declaration was made where an undivided share of real estate was limited to A. for life, with remainder (after intermediate limitations) to his "right heirs." It was held that the right heirs, being unascertained, came within the meaning of "unborn" persons (b). See s. 3 of the Act of 1876 (c).

Although no express provision to that effect is contained in the Partition Acts, it has been held that s. 1 of the Trustee Extension Act, 1852, applies to sales under these Acts. The express provision that s. 30 of the Trustee Act, 1850, shall apply, does not by implication exclude the application of s. 1 of the Act of 1852 (d).

#### SECTS. 23—25 OF S. E. ACT, 1856.

31 & 32 8. Sections twenty-three to twenty-five (both inclusive)  
 Vict. c. 40, of the Act of the session of the nineteenth and twentieth  
 § 8. years of Her Majesty's reign (chapter one hundred and  
 Sects. 23—25 of S. E. Act, 1856, incorporated. twenty), "to facilitate Leases and Sales of Settled Estates," shall extend and apply to money to be received on any sale effected under the authority of this Act.<sup>1</sup>

<sup>1</sup> These sections contain provisions similar to those of ss. 34, 35 and 36 of the Settled Estates Act, 1877, which are printed *in extenso* at pp. 439—441, *post*, where the differences between their provisions and those of the Act of 1856 are pointed out.

Where the money produced by a sale had been paid into Court, and some of the persons equitably interested therein were abroad and under disability, the Court refused to order the fund to be paid out to trustees who held powers of attorney (e). But in another case an order was made directing trustees to sell and divide the proceeds without the intervention of the Court (f). And even before the Married Women's

(z) *Re Sherard, Lowther v. Cuffe*, 1 D. J. & S. 421.

(a) *Lees v. Coulton, Lees v. Clutton*, L. R. 20 Eq. 20.

(b) *Basnett v. Moxon*, L. R. 20 Eq. 182—185.

(c) *Post*, p. 128.

(d) *Beckett v. Sutton*, 19 Ch. D. 646.

(e) *Aston v. Meredith*, L. R. 13 Eq. 492.

(f) *Hayward v. Smith*, 20 L. T. N. S. 70.

Property Act, 1882 (*g*), the share of a married woman was ordered to be paid out in cash to her husband upon her electing upon separate examination to adopt that course (*h*). And although BACON, V.-C., has refused to dispense with a separate examination in a case not within the Married Women's Property Act, 1882, where the share of proceeds was less than £200 (*i*), this decision was dissented from and not followed by JESSEL, M. R., who allowed sums less than £200 to be paid to married women on their separate receipts and affidavits of no settlement. He said when there is "a request for sale made by a *competent person*, all the consequences will follow, including conversion." *Per* JESSEL, M. R. (*k*).

31 & 32  
Vict. c. 40,  
§ 8.

But where infants are entitled as part owners of property ordered to be sold, their shares of the proceeds of sale will be treated as real estate (*l*). The heir of such an infant will, however, take the proceeds as money and not as land, so that on the death intestate of such heir the proceeds of sale will go to his legal personal representative (*m*). On the death intestate of a lunatic part-owner whose share of purchase-money had been paid into Court to the credit of the Master in Lunacy, such share was held to belong to his heir at law (*n*). And where a part-owner died before sale, his share was held to be converted and to go to his personal representatives (*o*), although he had not attained twenty-one (*p*). And the same rule was applied to the case of a married woman dying after sale, but before payment out of the proceeds (*q*). But this case was not followed by the late MASTER OF THE ROLLS (*r*).

Whether  
order for  
sale operates  
as  
conversion.

## PARTIES TO ACTION.

9. Any person who, if this Act had not been passed, might have maintained a suit for partition,<sup>1</sup> may maintain such suit against any one or more of the parties interested without serving the other or others (if any) of those parties; and it shall not be competent to any defendant in the suit to object for want of parties; and at the hearing

31 & 32  
Vict. c. 40,  
§ 9.

Who may  
maintain  
action.

(*g*) 45 & 46 Vict. c. 75.  
(*h*) *Standerling v. Hall*, 11 Ch. D. 652.  
(*i*) *Topham v. Burgoyne*, 49 L. J. Ch. 213.  
(*k*) *Wallace v. Greenwood*, 16 Ch. D. 366.  
(*l*) *Foster v. Foster*, 1 Ch. D. 588.  
(*m*) *Mordaunt v. Benwell*, 19 Ch. D. 302. Compare *Curteis v. Wormald*,

10 Ch. D. 172.  
(*n*) *Re Barker*, 17 Ch. D. 241.  
(*o*) *Arnold v. Dixon*, L. R. 19 Eq. 113.  
(*p*) *Steed v. Preece*, L. R. 18 Eq. 192.  
(*q*) *Fowler v. Scott*, 19 W. R. 972.  
(*r*) *Mildmay v. Quicke*, 6 Ch. D. 553.

31 & 32  
Vict. c. 40,  
§ 9. of the cause<sup>2</sup> the Court may direct such inquiries as to the nature of the property, and the persons interested therein, and other matters, as it thinks necessary or proper, with a view to an order for partition or sale being made on further consideration;<sup>3</sup> but all persons who, if this Act had not been passed, would have been necessary parties to the suit, shall be served with notice of the decree or order on the hearing,<sup>4</sup> and after such notice, shall be bound by the proceedings as if they had been originally parties to the suit, and shall be deemed parties to the suit; and all such persons may have liberty to attend the proceedings; and any such person may, within a time limited by general orders, apply to the Court to add to the decree or order.

Who may bring action for partition. Copyholds. Life estates. Terms of years. <sup>1</sup> Co-parceners have a common law right, and joint tenants, and tenants in common, a statutory right (s) to partition. This right extends to lands of copyhold or customary (t) as well as of freehold tenure. And it is immaterial whether their joint interests are in estates of inheritance, or in estates for life (u), or terms of years (x). But, as regards terms of years, a distinction has been drawn between a long term in which the reversion is merely nominal (y) and a short term under a lease with joint liability to rent and covenants (z). And as regards life estates and terms of years, it is expressly provided that the partition shall not be prejudicial or hurtful to "anny personne or personnes, their heirs or successours, other than suche whiche be parties unto the said partition, their executors or assigneis" (a).

Mortgagee. Lessee. Trustee. Partition may be decreed at the instance of a mortgagee (b) or lessee (c) of an undivided share. But the legal title must be before the Court, unless it is outstanding in a mortgagee. Trustees represent their *cestuis que trustent*, whether as plaintiffs or defendants (d).

Where three persons were entitled as tenants in common in fee subject to an executory devise over, a sale was ordered under this Act subject to the executory devise (e).

(s) 31 Hen. 8, c. 1.

(t) 4 & 5 Vict. c. 35, s. 85; 21 & 22 Vict. c. 94.

(u) 32 Hen. 8, c. 32; *Wills v. Slade*, 6 Ves. 498; *Gaskell v. Gaskell*, 6 Sim. 648.

(x) 32 Hen. 8, c. 32; *Baring v. Nash*, 1 Ves. & B. 551; *Ames v. Collins*, 16 W. R. 74.

(y) *Baring v. Nash*, 1 Ves. & B.

551.

(z) *North v. Guinan*, Beat. 342

(a) 32 Hen. 8, c. 32.

(b) *Fall v. Ekins*, 9 W. R. 861; *Davenport v. King*, 31 W. R. 911.

(c) *Heaton v. Deardon*, 16 B. 147.

(d) *Stace v. Gage*, 8 Ch. D. 451; *Simpson v. Denny*, 10 Ch. D. 28.

(e) *Groves v. Carbut*, 29 L. T. N. S. 129.

An action for partition can only be maintained by a part-owner of an estate in possession. A reversioner cannot bring such an action (f). And where a testator directed a sale by the trustees of his will on the death of a tenant for life, the Court refused to direct the sale during his life at the request of tenants in common in remainder who were equitably entitled to an undivided moiety of the property (g). 31 & 32  
Vict. c. 40,  
§ 9.  
Not re-  
versioner.

And partition or sale of property, subject to equitable life estates, with equitable cross-remainders in fee, where the trustees had active powers of management over the entirety of the estate, was refused (h).

A sale at the request of tenant for life and reversioners beneficially interested to the extent of one moiety was also refused where there was a discretionary trust for sale subsisting in trustees (i). But the existence of a mere power of sale at the request of the majority of the persons entitled does not oust the jurisdiction of the Court (k). But where infants were entitled as co-heiresses, subject to the dower of their mother (who was living), an order for sale was made—apparently by consent (l).

A tenant in common who has mortgaged his share to another tenant in common cannot obtain partition or sale without the consent of his mortgagee, unless he pays off the mortgage (m).

It has been held that a part-owner whose interest was not originally sufficient to maintain a suit could not obtain a sale by amending his bill and stating that he had since acquired such an interest. He ought to have dismissed his bill and filed another (n). But under the present practice the Court would, in such a case, exercise its power of allowing the plaintiff to amend.

<sup>a</sup> An immediate order for sale can be made at the hearing where the title is proved (o), but will not be made unless all persons in existence who are interested are parties (p); or are proved to be out of the jurisdiction (q). See notes to s. 3 of the Act of 1876 (r). Proceed-  
ings at the  
hearing

In an unreported case (s), HALL, V.-C., on the eve of the long vacation, directed a sale out of Court; but in another unreported case (t), he declined to do so. The latter case was recently followed by CHITTY, J. (u).

In other cases the usual course is to make an order for inquiries at the hearing. As to form of order, see p. 127.

If the action is commenced in a District Registry the judgment at the

(f) *Evans v. Bagshaw*, L. R. 8 Eq. 469; L. R. 5 Ch. 340; *Cass v. Wood*, 30 L. T. 670.

(g) *Swaine v. Denby*, 14 Ch. D. 326.

(h) *Taylor v. Grange*, 13 Ch. D. 223; 15 Ch. D. 165.

(i) *Biggs v. Peacock*, 20 Ch. D. 200; 22 Ch. D. 284.

(k) *Boyd v. Allen*, 31 W. R. 544.

(l) *Grove v. Comyn*, L. R. 18 Eq. 387.

(m) *Gibbs v. Hazdon*, 30 W. R. 726.

(n) *Evans v. Bagshaw*, L. R. 8 Eq. 469; L. R. 5 Ch. 340.

(o) *Lees v. Coulton*, *Lees v. Clutton*, L. R. 20 Eq. 20.

(p) *Ibid.*; *Mildmay v. Quicke*, L. R. 20 Eq. 537.

(q) *Silver v. Udall*, L. R. 9 Eq. 227.

(r) 39 & 40 Vict. c. 17, *post*, p. 128.

(s) *Allsop v. Allsop*.

(t) *Baker v. Baker*.

(u) *Strugnell v. Strugnell*, 28 S. J. 710.

31 & 32  
Vict. c. 40,  
§ 9. hearing (which will usually be in London) may direct inquiries to be made in the District Registry, with liberty to apply in Chambers (in London) for a sale (s).

Evidence  
of title.

Where the allegations in the statement of claim making out the title of the plaintiff are admitted by the statement of defence, the plaintiff may move upon admissions in the pleadings under the Rules of Court, 1883 (t), for the usual inquiries (u), or (if the admissions are sufficient to show that all persons interested are parties) for an immediate sale (v).

Motion on  
admission.

The proper course is to apply by motion for judgment, and not by summons (x).

It was held by HALL, V.-C. that if no defence has been delivered, the plaintiff should file a short affidavit concisely verifying the allegations of the statement of claim, although the defendant consented to the judgment asked for (y). But this was not required by JESSEL, M.R.

Whether  
contested  
questions  
will be  
decided  
at the  
hearing.

Before the Judicature Acts came into operation the Court at the hearing, on some occasions, decided questions of construction arising incidentally in partition suits (z), and, by consent, declared the rights of parties (a), including infants (b).

But it was held that partition suits were within the administrative and not the contentious jurisdiction of the Court (c); and where the plaintiff's title was contested the Court refused to decide the question, and retained the bill for a year, with liberty to the plaintiff to bring such action as he might be advised (d).

But now, s. 24, sub-s. 7, of the Judicature Act, 1873 (e), appears to make it compulsory for the Court to decide every claim properly brought forward in any cause or matter.

Where the plaintiff is in possession the Court will, at the trial, order an account of rents and profits received by him (f).

An inquiry as to incumbrances may be directed where it will help to clear the title (g).

A judgment referring to the description of the property in the claim was allowed by consent to be amended and post-dated upon an accidental omission in such description being discovered after the trial (h).

- (s) *Sykes v. Schofield*, 14 Ch. D. 629.
- (t) R.S.C. 1888, Ord. XXXII., r. 6.
- (u) *Gilbert v. Smith*, 2 Ch. D. 687.
- (v) *Burnell v. Burnell*, 11 Ch. D. 213.
- (x) *Cook v. Heynes*, W. N. (1884), p. 75.
- (y) *Senior v. Hereford*, 4 Ch. D. 494.
- (z) *Hurry v. Hurry*, L. R. 10 Eq. 346.
- (a) *Burt v. Hellyar*, L. R. 14 Eq. 160—166.
- (b) *Davey v. Weillisbach*, L. R. 15 Eq. 269; *Grove v. Comyn*, L. R. 18 Eq. 387.

- (c) *Burt v. Hellyar*, L. R. 14 Eq. 166.
- (d) *Slade v. Barlow*, L. R. 7 Eq. 296; *Bolton v. Bolton*, L. R. 7 Eq. 298, n.; 17 W. R. 366; *Ward v. Ward*, 18 W. R. 87; *Giffard v. Williams*, L. R. 5 Ch. 546 (reversing L. R. 8 Eq. 494).
- (e) 36 & 37 Vict. c. 66.
- (f) *Burnell v. Burnell*, 11 Ch. D. 213.
- (g) *Fawthrop v. Stock*, W. N. (1884), p. 118.
- (h) *Winkley v. Winkley*, 29 W. R. 628.

Where a defendant entitled to one-sixth share was in possession of the property (without any contract of tenancy), the Court refused, after an order for sale, to restrain him from selling hay and turnips off the land contrary to the custom of the country; but *semble* that any act amounting to waste would have been restrained (i). 81 & 82  
Vict. c. 40,  
§ 9.

<sup>2</sup> "Further consideration" does not necessarily mean technical further consideration in Court. "I should take the words in a popular sense as referring to any consideration the cause receives after the inquiries have been made." *Per* LORD CAIRNS, C. (j). Meaning  
of "further  
consideration."

In such cases it depends upon the result of the inquiries whether a sale will be ordered or not (k), and it has been held that a sale before certificate is not binding upon the purchaser, even though the certificate when made would justify a sale (l). On the other hand, a sale before the answer to a special inquiry as to a party presumed to be dead, has been supported (m).

In a recent case judgment was given directing inquiries as to the persons interested and whether they were parties; and ordering a sale if it should appear that the plaintiffs were interested to the extent of a moiety and requested a sale, and all other persons interested were parties; but giving liberty to apply in chambers for a sale (after the proper notices had been served) if all persons interested should not appear to be parties (n). This is now the usual form of order.

A sale may be directed to take place in chambers, before the chief clerk, either by auction or by tender, and the chief clerk may himself be allowed to sell by auction, without employing an auctioneer (o).

<sup>4</sup> As to the necessary parties, see notes to s. 3 of the Act of 1876, p. 129, *post*.

The following is the model form of claim in a Partition Action given in the Appendix to the Rules of the Supreme Court, 1883. [Ap. C., Form 13.]

In the High Court of Justice,

Chancery Division.

Writ issued the      of      , 1883.

Between A. B. . . Plaintiff.

and

C. D. . . Defendant.

#### STATEMENT OF CLAIM.

1. By will, dated January 5, 1864, A. devised Whiteacre to B., C. and D. as tenants in common.

(i) *Bailey v. Hobson*, L. R. 5 Eq. 180—182.

(j) *Powell v. Powell*, L. R. 10 Ch. 130—134; *cf.* *Mildmay v. Quicke*, L. R. 20 Eq. 537—8.

(k) *Buckingham v. Sellick*, 22 L. T. 870.

(l) *Powell v. Powell*, L. R. 10 Ch.

130.

(m) *Rawlinson v. Miller*, 1 Ch. D. 52.

(n) *Senior v. Hereford*, 4 Ch. D. 494. Compare *Underwood v. Stewardson*, 20 W. R. 668; *Harper v. Bird*, 23 W. R. 646.

(o) *Pemberton v. Barnes*, L. R. 13

Eq. 349—353.

81 & 82  
Vict. c. 40,  
§ 9.

- 2 On March 10, 1865, A. died.
3. On March 20, 1865, A.'s will was proved.
4. On June 25, 1867, B. conveyed to the plaintiff his share of Whiteacre.
5. On July 30, 1869, C. conveyed his share to the defendants on trust for sale.
6. By will, dated November 5, 1872, D. devised his share among his children equally.
7. On December 2, 1872, D. died.
8. On December 15, 1872, D.'s will was proved.
9. There were ten children of D. living at his decease, some of whom have since died.
- [10. Whiteacre consists of a mansion house, and grounds.
11. A sale of the property and a division of the proceeds will be more beneficial than a division of the property.]

The plaintiff claims:—

A division of Whiteacre among the parties interested.

[Or, A sale of Whiteacre and distribution of the proceeds among the parties interested.]

(Signed)

Delivered.

For minutes of judgment see *Senior v. Hereford* (p) and *Seton* (q).

The Court has power to dispense with service of the judgment on absent persons, under s. 3 of the Partition Act, 1876, which is as follows:—

#### SERVICE ON ABSENT PERSONS.

89 & 40  
Vict. c. 17,  
§ 3.

Power to  
Court to  
dispense  
with ser-  
vice of  
judgment  
on certain  
persons  
interested.

- [3. Where in an action for partition it appears to the Court that notice of the judgment on the hearing of the cause cannot be served on all the persons on whom that notice is by the Partition Act, 1868; required to be served,<sup>1</sup> or cannot be so served without expense disproportionate to the value of the property to which the action relates,<sup>2</sup> the Court may, if it thinks fit, on the request of any of the parties interested in the property, and notwithstanding the dissent or disability of any others of them, by order, dispense with that service<sup>3</sup> on any person or class of persons specified in the order, and, instead thereof, may direct advertisements<sup>4</sup> to be published at such times and in such manner as the Court shall think fit, calling upon

(p) 4 Ch. D. 494.

(q) 4th ed. 1004—1009.



all persons claiming to be interested in such property who have not been so served to come in and establish their respective claims in respect thereof before the judge in chambers within a time to be thereby limited. After the expiration of the time so limited all persons who shall not have so come in and established such claims, whether they are within or without the jurisdiction of the Court (including persons under any disability), shall be bound by the proceedings in the action as if on the day of the date of the order dispensing with service they had been served with notice of the judgment, service whereof is dispensed with; and thereupon the powers of the Court, under the Trustee Act, 1850, shall extend to their interests in the property to which the action relates as if they had been parties to the action; and the Court may thereupon, if it shall think fit, direct a sale of the property and give all necessary or proper consequential directions.]

39 & 40  
Vict. c. 17,  
§ 3.

<sup>1</sup> Under the Act of 1868 (*r*) it had been held that the Court need not make an order for sale or partition in the absence of any of the persons interested (*s*), but that an order *could* be made if such persons were proved to be abroad (*t*). And where a person who, if living, would be entitled to one-twenty-fourth of the property, had not been heard of for fourteen years, a sale was ordered in his absence (*u*). It was also held that, where one of seven tenants in common had not been heard of for seventeen years, a good title to the property could be made by the other six (*v*).

<sup>2</sup> On the other hand, where a defendant entitled to one-forty-fifth of the property was out of the jurisdiction, the Court refused to order a sale until he had been served (*w*). Parties out of jurisdiction.

<sup>3</sup> And even where an immediate decree for a sale was made in the absence of parties proved to be abroad, it was held that such order ought not to be acted upon until notice had been given to the absent parties by advertisement (*x*).

<sup>4</sup> And in a subsequent case LORD ROMILLY doubted whether notice by

(*r*) See s. 9, *ante*, p. 128.

(*s*) *Dodds v. Gronow*, 17 W. R. 511.

(*t*) *Silver v. Udall*, L. R. 9 Eq. 227.

(*u*) *Jackson v. Lomas*, 23 W. R. 744.

(*v*) *Rawlinson v. Miller*, 1 Ch. D. 52.

(*w*) *Hurry v. Hurry*, L. R. 10 Eq. 346—348.

(*x*) *Peters v. Facon*, L. R. 8 Eq. 125.



39 & 40  
Vict. c. 17,  
§ 3. advertisement was sufficient *service* under s. 9 of the principal Act (y). This doubt is, of course, set at rest by the above section.

Where trustees were before the Court, service on the persons beneficially interested was dispensed with (z). Where service of judgment for sale on absent parties is dispensed with, the judgment ought not to be prefaced by a statement that the Court considers a sale more beneficial than a partition (a). For form of order dispensing with service, see *Re Hardiman* (b).

#### DISTRIBUTION OF PROCEEDS.

Where service is dispensed with under s. 3 of the Act of 1876, the provisions of ss. 4 and 5 of the same Act come into effect, viz.:—

39 & 40  
Vict. c. 17,  
§ 4. [4. Where an order is made under this Act dispensing with service of notice on any person or class of persons, and property is sold by order of the Court, the following provisions shall have effect :

Proceeds  
of sale,  
how dealt  
with.

- (1.) The proceeds of sale should be paid into court to abide the further order of the Court:
- (2.) The Court shall, by order, fix a time, at the expiration of which the proceeds will be distributed, and may from time to time, by further order, extend that time :
- (3.) The Court shall direct such notices to be given by advertisements or otherwise as it thinks best adapted for notifying to any persons on whom service is dispensed with, who may not have previously come in and established their claims, the fact of the sale, the time of the intended distribution and the time within which a claim to participate in the proceeds must be made :
- (4.) If at the expiration of the time so fixed or extended the interests of all the persons interested have been ascertained, the Court shall distribute

(y) *Teall v. Watts*, L. R. 11 Eq. 213.      *ten*, 16 Ch. D. 360.  
(z) *Stace v. Gage*, 8 Ch. D. 451.      (b) *Ibid*.  
(a) *Re Hardiman, Pragnall v. Bat-*

the proceeds in accordance with the rights of those persons : 39 & 40  
Vict. c. 17,  
§ 4.

- (5.) If at the expiration of the time so fixed or extended the interests of all the persons interested have not been ascertained, and it appears to the Court that they cannot be ascertained, or cannot be ascertained without expense disproportionate to the value of the property or of the unascertained interests, the Court shall distribute the proceeds in such manner as appears to the Court to be most in accordance with the rights of the persons whose claims to participate in the proceeds have been established, whether all those persons are or are not before the Court, and with such reservations (if any) as to the Court may seem fit in favour of any other persons, (whether ascertained or not) who may appear from the evidence before the Court to have any *prima facie* rights which ought to be so provided for, although such rights may not have been fully established, but to the exclusion of all other persons, and thereupon all such other persons shall by virtue of this Act be excluded from participation in those proceeds on the distribution thereof, but notwithstanding the distribution any excluded person may recover from any participating person any portion received by him of the share of the excluded person.

<sup>1</sup> These advertisements cannot be dispensed with (c).

- [5. Where in an action for partition two or more sales are made, if any person who has by virtue of this Act been excluded from participation in the proceeds of any of those sales establishes his claim to participate in the proceeds of a subsequent sale, the shares of the other persons interested in the proceeds of the subsequent sale shall abate to the 39 & 40  
Vict. c. 17,  
§ 5.  
Marshall-  
ing of pro-  
ceeds  
where two  
sales.

(c) *Hacking v. Whalley*, 51 L. J. Ch. 944.

39 & 40  
Vict. c. 17,  
§ 5.

extent (if any) to which they were increased by the non-participation of the excluded person in the proceeds of the previous sale, and shall to that extent be applied in or towards payment to that person of the share to which he would have been entitled in the proceeds of the previous sale if his claim thereto had been established in due time.]

#### COSTS.

31 & 32  
Vict. c. 40,  
§ 10.

**10.** In a suit for partition the Court may make such order as it thinks just respecting costs up to the time of the hearing.

Costs up to  
hearing.

The Court  
now has a  
discretion  
as to costs.

Although LORD ROMILLY, M.R., was at one time of a contrary opinion (*d*), it is now settled that this section alters the old rule under which all parties paid their own costs up to the hearing. There is now no general rule as to costs (*e*); they will depend on the particular circumstances of each case. Sometimes the old rule will still be followed (*f*); but the more usual course has been to charge the whole costs upon the proceeds of sale (*g*); and in the absence of special circumstances arising from the conduct of any of the parties, LORD ROMILLY thought this ought to be the rule (*h*). In an action claiming partition only, FRX, J., ordered the costs to be borne by the parties rateably according to their shares, which was in effect the same as charging them upon the proceeds of sale (*i*). And this was the rule generally followed by JESSEL, M. R., who also refused to allow costs as between solicitor and client, except by consent of all parties (*k*).

Until an order has been made for payment of costs out of the whole proceeds of sale, the Court will only give the solicitor of a party who threatens to change his solicitor a charge on the share of such party (*l*).

#### POWER TO MAKE RULES.

30 & 31  
Vict. c. 40,  
§ 11.

**11.** Sections nine, ten, and eleven of the Chancery Amendment Act, 1858, relative to the making of general orders, shall

Sects. 9-11  
of Chan-

(*d*) *Landell v. Baker*, L. R. 6 Eq. 268.

(*e*) *Simpson v. Ritchie*, L. R. 16 Eq. 103.

(*f*) *Wilkinson v. Joberns*, L. R. 16 Eq. 14-17; *Simpson v. Ritchie*, L. R. 16 Eq. 103-104.

(*g*) *Osborn v. Osborn*, L. R. 6 Eq. 338; *Miller v. Marriott* L. R. 7 Eq. 1; *Leach v. Westall*, 17 W. R. 313;

*France v. France*, L. R. 13 Eq. 173; *Thompson v. Richardson*, L. R. 6 Eq. 596-598.

(*h*) *Cannon v. Johnson*, L. R. 11 Eq. 90.

(*i*) *Bowes v. Marquis of Bute*, 27 W. R. 750.

(*k*) *Ball v. Kemp Welch*, 14 Ch. D. 514.

(*l*) *Lloyd v. Jones*, 27 W. R. 655.

have effect as if they were repeated in this Act, and in terms made applicable to the purposes thereof.

30 & 31  
Vict. c. 40,  
§ 11.

These sections gave power to make rules and orders for carrying into effect the purposes of the Act; but as such powers have not been exercised, it is unnecessary to do more than refer to them.

cery  
Amend-  
ment Act,  
1858,  
incorpo-  
rated.

Sect. 11 of the Chancery Amendment Act, 1858, is repealed by s. 29 of the Supreme Court of Judicature (Officers) Act, 1879 (*m*); but of course such repeal does not affect the provision that it shall have effect as if repeated here.

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COUNTY COURTS—JURISDICTION.

**12.** In England the County Courts shall have and exercise the like power and authority as the Court of Chancery in suits for partition (including the power and authority conferred by this Act) in any case where the property to which the suit relates does not exceed in value the sum of five hundred pounds, and the same shall be had and exercised in like manner and subject to the like provisions as the power and authority conferred by section one of the County Courts Act, 1865.

30 & 31  
Vict. c. 40,  
§ 12.

Jurisdic-  
tion of  
County  
Courts.

(*m*) 42 & 43 Vict. c. 78.

# THE STATUTES

RELATING TO

## EXONERATION OF CHARGES.

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17 & 18 Vict. c. 113.  
30 & 31 Vict. c. 69.  
40 & 41 Vict. c. 34.

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### SUMMARY.

THE principal Statute relating to the incidence of mortgage debts in the administration of the assets of deceased persons is known as Locke King's Act (*n*), and it has been amended by the Act usually called Locke King's Act Amendment Act, 1867 (*o*), and by the Exoneration of Charges Act, 1877 (*p*). Locke King's Act, as originally passed and construed, applies only to the estates of testators whose wills were made and who died between 31st December, 1854, and 31st December, 1867. The effect of this Act is that mortgages affecting the freehold estates of such testators must be borne by such estates unless the will contains some direction for payment of debts. The Amendment Act applies to all testators dying after 31st December, 1867, though their wills may have been made previously, and it extends to liens for unpaid purchase-money as well as to mortgages of real estates. As to such testators, a direction expressly or by necessary implication

(*n*) 17 & 18 Vict. c. 113.  
(*o*) 30 & 31 Vict. c. 69.

(*p*) 40 & 41 Vict. c. 34.

referring to mortgage debts is necessary in order to exonerate the real estate. The estates of intestates who died before 31st December, 1877, are not affected by either of these Acts, nor do they appear to apply to the copyholds or leaseholds of testators who died before that date. But the Exoneration of Charges Act, 1877, extends the powers of the two previous Acts to intestates dying after 31st December, 1877, and to lands of any tenure forming part of the estates of testators as well as intestates dying after that date. It also removes a doubt which had previously arisen, as to whether a direction for payment of debts out of residuary real and personal or residuary real estate, was sufficient to exonerate a mortgaged estate, by providing in effect that such a direction or a similar charge shall not be deemed sufficient.

## LOCKE KING'S ACT.

17 &amp; 18 VICT. c. 113.

*An Act to amend the law relating to the administration of the estates of deceased persons.*

17 & 18  
Vict.  
c. 113.  
Preamble.

Old law.

Mortgages  
formerly  
payable  
out of per-  
sonalty.

WHEREAS it is expedient that the law whereunder the real and personal assets of deceased persons are administered should be amended.<sup>1</sup> Be it enacted, &c.

<sup>1</sup> Equity regards a mortgage merely as a security for money; and, before this enactment, money so secured formed no exception to the general rule, that all the debts of a testator or intestate were, in the absence of some special provision, payable primarily out of his personal estate. And even where mortgaged real estate was specifically devised "subject nevertheless to the mortgages affecting the same," it was held that the testator's personal estate was primarily liable to pay the mortgage debts (*q*). In that case, however, the testator had directed his debts to be paid out of his personal estate, and had charged them on his real estate in case the personalty should prove insufficient.

But the rule is stated by LORD HATHERLEY (then V.-C. WOOD) as follows:—

"It has long since been settled by the authorities to which I have referred (*r*), that a devise of an estate, expressed to be subject to a mortgage, in no way imposes upon the devisee any liability in respect of the mortgage" (*s*).

This rule, however, only applied as between the real and personal representatives of the testator or intestate, and not as between his personal representatives and the real representatives of his heir or devisee. Thus, where a testator who had devised mortgaged real estate to his wife in fee, and also bequeathed his personal estate to her, died in 1854, and his wife died two days afterwards, it was held that *her* heir was not entitled to hold the property exonerated from the mortgage (*t*). And the rule would yield to an expression of a contrary intention. For instance, a testator directed his trustees to receive the rents of his real and leasehold estates and apply the same

Unless  
contrary  
intention.

(*q*) *Townshend v. Mostyn*, 27 B. 72.  
(*r*) *Galton v. Hancock*, 2 Atk. 480;  
*Watson v. Brickwood*, 9 Ves. 447;  
*Lockhart v. Hardy*, 9 B. 379.

(*s*) *Goodwin v. Lee*, 1 K. & J. 377—  
880.

(*t*) *Swainson v. Swainson*, 6 D. M.  
G. 648.

in payment, *inter alia*, of all his just debts, together with all principal money and interest owing upon mortgage of his property. He also gave mortgaged leaseholds to A., B. and C., and unincumbered leaseholds to D., and died possessed of no freehold estate. It was held that all the leaseholds, according to their respective values, must contribute rateably to the payment of his debts, including mortgage debts (u).

17 & 18  
Vict.  
c. 113.  
Preamble.  

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Old law.

1. When any person shall, after the thirty-first day of December, one thousand eight hundred and fifty-four, die seised of or entitled to any estate or interest in any land<sup>1</sup> or other hereditaments which shall at the time of his death be charged with the payment of any sum or sums of money by way of mortgage,<sup>2</sup> and such person shall not by his will or deed,<sup>3</sup> or other document, have signified any contrary or other intention,<sup>4</sup> the heir or devisee to whom such land or hereditaments shall descend or be devised shall not be entitled to have the mortgage debt discharged or satisfied out of the personal estate or any other real estate of such person,<sup>5</sup> but the land or hereditaments so charged shall, as between the different persons claiming through or under the deceased person, be primarily liable to the payment of all mortgage debts with which the same shall be charged, every part thereof, according to its value, bearing a proportionate part of the mortgage debts charged on the whole thereof:<sup>6</sup> Provided always, that nothing herein contained shall affect or diminish any right of the mortgagee on such lands or hereditaments to obtain full payment or satisfaction of his mortgage debt either out of the personal estate of the person so dying as aforesaid or otherwise: Provided also, that nothing herein contained shall affect<sup>6</sup> the rights of any person claiming under or by virtue of any will, deed, or document already made or to be made before the first day of January, one thousand eight hundred and fifty-five.<sup>7</sup>

17 & 18  
Vict.  
c. 113,  
§ 1.  

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Mortgages  
payable  
out of real  
estate  
thereby  
charged  
unless  
contrary  
intention  
expressed.

<sup>1</sup> Copyholds are within the Act (x), but leaseholds for years are not (y), Copy holds.

(u) *Harper v. Munday*, 7 D. M. G. 369.

(x) *Rowson v. Harrison*, 31 B. 207; *Piper v. Piper*, 1 J. & H. 91; *Nelson*

*v. Page*, L. R. 7 Eq. 25.

(y) *Solomon v. Solomon* 33 L. J. Ch. 473; *Re Wormsley, Hill v. Wormsley*, 4 Ch. D. 665.



17 & 18  
Vict.  
c. 113,  
§ 1.

Lease-  
holds for  
years.

Lease-  
holds for  
lives.

"Interest  
in land."

What is a  
"mort-  
gage."

Equitable  
mortgage.

Charge by  
deed.

What is  
not a

as regards testators or intestates dying before 31st December, 1877 (z). But see *Catty v. Bull* (a).

And it would probably be held that leaseholds for lives are not within this Act, or the Amendment Act of 1867 (b). But where freeholds and leaseholds were comprised in the same mortgage, it was held, in 1862, that they must bear the burden rateably (c). And the same rule was recently applied to a case where the mortgage comprised both real and other personal estate (d).

A testator who died in 1870, was entitled to an undivided third part of mortgaged real estate settled upon trusts for sale and distribution of the proceeds, with a proviso that any beneficiary might enjoy his share *in specie*, but that it should be deemed personal estate. *MALINS, V.-C.*, held that it was not an interest in land within the meaning of the Act. The Act contemplates the taking of land *quod* land (e).

<sup>2</sup> The Act only applies "where there is a defined and specified charge on a specific estate, and to the extent of that charge." *Per LORD ROMILLY, M.R. (f)*. "My impression is that Locke King's Act only applies where a property is specifically charged." *Per JESSEL, M.R. (g)*. Therefore a general charge of real estate by will, in case the personal estate shall be insufficient, is not a charge or mortgage within the Act (h).

An equitable mortgage by deposit is within the Act (i), whether there be an agreement to execute a legal mortgage (k) or not (l), even though there may be no memorandum of deposit (m). A vendor's lien was held not to be a mortgage within this Act. See note 2 to s. 2 of the Amendment Act of 1867 (n).

<sup>3</sup> In 1855 A. conveyed mortgaged real estate in Scotland to B. in fee, "with and under the burden of the payment of the real or heritable debts which affect the said lands, and also with and under the burden of the payment of the real debts or mortgages which affect my property in the Isle of Wight." By his will in 1855 he also devised his lands in the Isle of Wight to B. It was, of course, held that B. was not entitled to have the Isle of Wight mortgages paid out of A.'s personal estate (o).

<sup>4</sup> A testator, who died in 1864, directed the payment of his just debts

(z) See 40 & 41 Vict. c. 84, p. 146, *post*.

(a) 31 W. R. 854.

(b) See and consider *Blake v. Luxton*, 6 T. R. 289—291; *Ripley v. Waterworth*, 7 Ves. 425—437.

(c) *Evans v. Wyatt*, 31 B. 217.

(d) *Trestrail v. Mason*, 7 Ch. D. 655.

(e) *Lewis v. Lewis*, L. R. 13 Eq. 219.

(f) *Hepworth v. Hill*, 30 B. 476—483.

(g) *Re Dunlop, Dunlop v. Dunlop*, 21 Ch. D. 590.

(h) *Ibid*.

(i) *De Rochfort v. Dawes*, L. R. 12 Eq. 540.

(k) *Coleby v. Coleby*, L. R. 2 Eq. 808.

(l) *Pembroke v. Friend*, 1 J. & H. 182.

(m) *Davis v. Davis*, 24 W. R. 962.

(n) 30 & 31 Vict. c. 69, p. 145, *post*.

(o) *Smith v. Moreton*, 37 L. J. Ch. 6.

as soon as could be after his decease, and devised mortgaged real estate in strict settlement, with trusts (*inter alia*) to keep down the interest of any sum which might be charged thereon by way of mortgage. It was held that he had not thus "signified any contrary or other intention" (*p*). As regards testators whose wills were made after 1st January, 1855, and who died before 31st December, 1867, it has been held that no "contrary or other intention" was signified by a direction by the testator that all his just debts be paid as soon as convenient after his decease (*q*); a direction that all his just debts be paid out of his estate (*r*); a direction that all his just debts be paid and discharged by his executors as soon as convenient out of his estate (*s*); a direction that all his just debts should be paid by his executors as soon as convenient out of his personal estate (*t*). In all these cases there was a specific devise of mortgaged real estate. See also as to a testator dying after 1867, *Elliott v. Dearsley* (*u*).

17 & 18  
Vict.  
c. 113,  
§ 1.

contrary  
intention  
in wills  
before  
1868.

On the other hand, a "contrary or other intention" has been held to be signified by testators who died before 31st December, 1867, by a gift of residuary real and personal estate "after paying my mortgage and other debts" (*x*); by a gift of residuary real and personal estate "subject in the first place to the payment and satisfaction of my just debts" (*y*); by a bequest of personal estate "subject to payment thereof of all my just debts" (*z*); by a bequest of personal estate "subject to the payment of my debts" (*a*); by a declaration that the testator's personal estate should be liable to the payment of all his just debts (*b*); by a bequest of personal estate upon trusts for sale and conversion, and, *inter alia*, payment of all just debts (*c*), although certain specialty debts, not including the mortgage debts, were expressly mentioned (*d*), and although the devisee of the mortgaged estate was himself one of the executors (*e*); by a declaration that residuary real estate should bear all mortgages charged thereon, and that all debts should be paid out of residuary estate (*f*); and also by a gift of residuary real estate (*g*), or of residuary real and personal estate upon trust for sale, and, *inter alia*, payment of all just debts (*h*).

What is a  
contrary  
intention  
in wills  
before  
1868.

(*p*) *Coot v. Lowndes*, L. R. 10 Eq. 376.

(*q*) *Pembroke v. Friend*, 1 J. & H. 132.

(*r*) *Brownson v. Lawrance*, L. R. 6 Eq. 1—5.

(*s*) *Woolstencroft v. Woolstencroft*, 2 D. F. J. 347 (reversing 2 Giff. 192).

(*t*) *Rowson v. Harrison*, 31 B. 207.

(*u*) 16 Ch. D. 322.

(*x*) *Greathed v. Greathed*, 26 B. 621—629.

(*y*) *Stone v. Parker*, 1 Dr. & Sm. 212.

(*z*) *Mellish v. Vallins*, 2 J. & H. 194.

(*a*) *Eno v. Tatham*, 1 N. R. 529.

(*b*) *Rodhouse v. Mold*, 12 L. T. N. S. 629.

(*c*) *Moore v. Moore*, 1 De G. J. & S. 602.

(*d*) *Porcher v. Wilson*, 12 W. R. 1001.

(*e*) *Smith v. Smith*, 3 Giff. 263—275.

(*f*) *Allen v. Allen*, 30 B. 395.

(*g*) *Newman v. Wilson*, 31 B. 38.

(*h*) *Maxwell v. Hyslop*, L. R. 4 Eq. 407; *Maxwell v. Maxwell*, L. R. 4 H. L. 506; see also *Dacre v. Patrickson*, 1 Dr. & S. 186—191.

17 & 18  
Vict.  
c. 113,  
§ 1.

There was a specific devise, or a disposition equivalent thereto, in all these cases; and the basis of these decisions appears to be that other sources were expressly provided for payment. It is settled that as regards testators dying before 1868 the word "debts" is sufficient to include mortgage debts, unless a contrary intention appears (i). As to testators dying since the Act of 1867, see *Newmarch v. Storr* (j).

The following remarks of LORD WESTBURY, C., are worthy of note:—"I may remark that I should be unwilling to hold that a mere technical rule of interpretation is to be regarded in all cases as sufficient to exclude, or signifying marks of intention so as to bring the case within the statute, and that it may probably be better to rest each case on its own particular circumstances, collecting the signification and intention in every particular case, not from the words only, but from the whole will and the nature of the gifts made by the will" (k).

See the cases upon residuary and specific devises in the next notes; and as to the rule applicable to testators dying between 31st December, 1867, and 31st December, 1877, see the Amendment Act of 1867 (l), and notes thereto. As to testators dying after that date, see the Exoneration of Charges Act, 1877 (m).

<sup>5</sup> "I understand the words 'or any other real estate of such person' to mean 'other real estate not descended or devised to such heir or devisee,' not 'other real estate comprised in the mortgage.'" *Per* JESSEL, M. R. (n).

<sup>6</sup> Where a testator (who died in 1856 intestate as to a mortgaged estate) by will made in 1855 specifically devised another estate also charged with the same debt, it was held that the devised estate was exonerated, and the whole debt was primarily payable out of the descended estate (o).

Contri-  
bution  
between  
separate  
properties  
comprised  
in the  
same mort-  
gage.

And on the principle that since the Wills Act (p) a residuary devise is not specific (q), it was held that where two estates or parts of an estate were subject to a mortgage, and one was specifically devised, while the other passed by a residuary devise, the mortgage debt was primarily payable out of the latter to the exoneration of the former (r).

But this decision has since been overruled, and it has been held that in such a case each estate or part of an estate must bear a proportionate

(i) *Stone v. Parker*, 1 Dr. & Sm. 212; *Maxwell v. Maxwell*, L. R. 4 H. L. 506.

(j) 9 Ch. D. 12.

(k) *Rolfe v. Perry*, 3 De G. J. & S. 486.

(l) 30 & 31 Vict. c. 69, p. 142, *post*.

(m) 40 & 41 Vict. c. 34, p. 146, *post*.

(n) *Newmarch v. Storr*, 9 Ch. D. 12—17.

(o) *Stringer v. Harper*, 26 B. 33.

(p) 1 Vict. c. 26.

(q) *Barnwell v. Iremonger*, 1 Dr. & Sm. 242.

(r) *Brownson v. Lawrence*, L. R. 6 Eq. 1—6; and compare *Rodhouse v. Mold*, 12 L. T. N. S. 629.

part of the mortgage debt (s). "It does not appear to me that Locke King's Act was intended to apply as between specific and residuary devises in the way it was held to apply in *Brownson v. Lawrance*." *Per* JESSEL, M. R. (t). Compare *Re Newmarch* (u).

17 & 18  
Vict.  
c. 113,  
§ 1.

A testator deposited the deeds relating to his X. estate with his bankers, to secure the balance of his account. Subsequently he deposited the deeds of another estate, saying he required further advances, which were made. Soon afterwards he died, having specifically devised (by will made in 1862) both estates. Held that the amount owing up to the time of the second deposit must be borne by the X. estate, and that, after deducting that amount from the value of the X. estate, both estates must contribute rateably to the payment of the balance (x). And, similarly, where the X. estate was mortgaged to secure 1500*l.*, and subsequently the same estate, with other real estate and a policy of assurance, were mortgaged to secure further advances, it was held, on the death, intestate, of the mortgagor, in 1867, that the X. estate was primarily liable to pay the 1500*l.*, and that the further advances must be apportioned rateably between the real (including X.) estate and the policy (y). The last two cases have been doubted by JESSEL, M.R., so far as the question of primary liability for the original advances is concerned (z). And although leaseholds, if mortgaged alone, were not within the Act, it was held in 1862 that when freeholds and leaseholds were mortgaged together both must bear the burden rateably (a). And the same rule applies where real estate and a policy of assurance are comprised in the same mortgage (b); and where (1) deeds of specifically devised freeholds, (2) deeds of freeholds comprised in a residuary devise, and (3) bonds comprised in a residuary bequest, are deposited by a testator to secure a debt due to his bankers (c).

But the Court of Appeal has held that even if a banking company had by its deed of settlement charged the shares therein with all debts due from the shareholders to the company, a debt for which real estate had been specifically mortgaged by a shareholder would still be payable out of the mortgaged estate before resorting to the shares, which would be subject only to a general lien (d).

"The doctrine of equity as to contribution . . . only applies where two properties are *equally* charged." *Per* JESSEL, M. R. (e).

(s) *Gibbins v. Byden*, L. R. 7 Eq. 371—375; *Sackville v. Smyth*, L. R. 17 Eq. 158.

(t) *Ibid.*, 155.

(u) 9 Ch. D. 12.

(x) *De Rockfort v. Dawes*, L. R. 12 Eq. 540.

(y) *Lipscombe v. Lipscombe*, L. R. 7 Eq. 501.

(z) *Leonino v. Leonino*, 10 Ch. D.

466—7.

(a) *Evans v. Wright*, 31 B. 217.

(b) *Trestrail v. Mason*, 7 Ch. D. 655; compare *Dacre v. Patrickson*, 1 Dr. & Sm. 186.

(c) *Leonino v. Leonino*, 10 Ch. D. 460.

(d) *Re Dunlop, Dunlop v. Dunlop*, 21 Ch. D. 583.

(e) *Ibid.*, p. 592.

17 & 18  
Vict.  
c. 113,  
§ 1.

<sup>7</sup> "Affect" means "injuriously affect" or "prejudice," and does not prevent a legatee from being beneficially affected by the burden of a mortgage debt being thrown on the heir (*f*).

Meaning  
of "affect."

<sup>8</sup> This proviso extends to the case of a devisee only, and not to the case of an intestacy if the intestate died after 1st January, 1855 (*g*), although he may have made a will prior to that date (*h*). And the heir will not be considered as claiming "under or by virtue of" a will, although he only takes a lapsed devise given by will dated prior to 1st January, 1855 (*i*).

A will made before 1st January, 1855, is within this proviso, although it may have been confirmed or republished after that date (*k*).

If the heir claims immediately by descent, the fact that a mortgage made before 1st January, 1855, reserves the equity of redemption to the mortgagor *and his heirs*, will not bring him within the protection of this proviso (*l*).

#### EXTENT OF ACT.

17 & 18  
Vict.  
c. 113,  
§ 2.

**2.** This Act shall not extend to Scotland.

The estates of testators who died after 31st December, 1867, are governed by Locke King's Act, as amended by

#### 30 & 31 VICT. c. 69.

*An Act to explain the operation of an Act passed in the 17th & 18th years of Her present Majesty, chapter 113, intituled "An Act to amend the Law relating to the Administration of the Estates of Deceased Persons."*

30 & 31  
Vict. c. 69.  
Preamble.

WHEREAS by an Act passed in the seventeenth and eighteenth year of Her present Majesty it is enacted, among other things, when any person shall, after the thirty-first of December, one thousand eight hundred and fifty-four, die seised of or entitled to any estate or interest in any land or other hereditaments which shall at the time of his death be charged with the payment of any sum or sums of money by way of mortgage, and such person shall not, by his will or deed

(*f*) *Power v. Power*, 8 Ir. Ch. R. 340; compare 2 Jarman on Wills, 4th ed., 651.

(*g*) *Piper v. Piper*, 1 J. & H. 91; *Day v. Day*, 14 W. R. 261.

(*h*) *Power v. Power*, 8 Ir. Ch. R.

340.

(*i*) *Nelson v. Page*, L. R. 7 Eq. 25—27.

(*k*) *Rolfe v. Perry*, 3 De G. J. & S. 481.

(*l*) *Piper v. Piper*, 1 J. & H. 91.

or other document, have signified any contrary or other intention, the heir or devisee to whom such land or hereditaments shall descend or be devised shall not be entitled to have the mortgage debt discharged or satisfied out of the personal estate or any other real estate of such person, but the land or hereditaments so charged shall, as between the different persons claiming through or under the deceased person, be primarily liable to the payment of all mortgage debts with which the same shall be charged, every part thereof, according to its value, bearing a proportionate part of the mortgage debts charged on the whole thereof:

30 & 31  
Vict. c. 69.  
Preamble.

And whereas doubts may exist upon the construction of the said Act, and it is expedient that such doubts, should for the future be removed:

Doubts on  
construction of  
Locke  
King's  
Act.

Be it therefore enacted, &c.

1. In the construction of the will of any person who may die after the thirty-first day of December, one thousand eight hundred and sixty-seven, a general direction that the debts or that all the debts of the testator shall be paid out of his personal estate<sup>1</sup> shall not be deemed to be a declaration of an intention contrary to or other than the rule established by the said Act, unless such contrary or other intention shall be further declared by words expressly or by necessary implication referring to all or some of the testator's debts or debt charged by way of mortgage on any part of his real estate.

30 & 31  
Vict. c. 69,  
§ 1.

Mere  
direction  
for debts  
to be paid  
out of  
person-  
alty, not  
to include  
mortgage  
debts.

<sup>1</sup> This section renders the cases cited in note 4 to Locke King's Act (*m*), which were based on the principle that a direction to pay debts out of personal estate provided a fund for payment of mortgage as well as other debts, inapplicable to the estates of testators dying after 31st December, 1867. It will be observed that no mention is made of a general *trust* for payment of debts; but it appears that such a trust is merely a "general direction" under this section, unless it expressly refers to specified mortgage debts (*n*). Nor is a power to trustees to pay off mortgages more than such a general direction (*o*).

A testator, who died in 1868, directed all just debts to be paid by his executors as soon as conveniently might be after his decease. As might

(*m*) *Ante*, pp. 138—140.

(*n*) *Elliott v. Dearsley*, 16 Ch. D. 322.

(*o*) *Re Bull, Catty v. Bull*, 31 W. R. 854.

30 & 31  
Vict. c. 69,  
§ 1. be expected, this was held insufficient to exonerate a mortgaged estate (*p*). A testator, who died in 1879, by will, dated 1877, directed his executors to pay all his just debts, funeral and testamentary expenses, out of his personal estate in exoneration of his real estate. This was held insufficient to exonerate his real estate from mortgage debts (*q*).

What is a  
contrary  
intention  
in wills  
since 1867.

So, where a testator, who died in 1874, by will, made in 1866, gave the residue of his real (including mortgaged realty) and personal estate to trustees upon trust to convert and pay debts, including debts due on mortgage of specifically devised land, it was held that the mortgages on the residuary real estate were payable out of such real estate and not out of the personalty (*r*).

And although the section only refers to *personal* estate, a direction to pay debts out of personal estate, coupled with a charge on residuary real estate in case the personal estate should be deficient, has been held insufficient (*s*).

And an opinion has been expressed by MALINS, V.-C., that a direction for payment of debts out of residuary real and personal estate, although sufficient if the testator died *before* 31st December, 1867, would be insufficient if he died *after* that date (*t*). A charge of specifically devised real estate "in aid of my personal estate and in exoneration of my other real estate, with the payment of all my just debts and my testamentary expenses," has been held insufficient by the Court of Appeal in the case of a will made in 1875 containing separate specific devises of portions of real estate, both of which were subject to the same mortgage (*u*).

"It is impossible not to hold that the same words that are insufficient to charge the testator's personal estate are insufficient also to charge his other real estate." *Per* JESSEL, M.R. (*x*).

On the other hand, where a testator specifically devised real estate which was subject to three mortgage debts, and directed that such estate should be charged with two mortgage debts subsisting thereon, in exoneration of his personal estate, and subsequently bequeathed his personal estate subject to the payment of his debts other than those he had previously provided for, it was held that an intention was expressed that the third mortgage debt should be paid out of his personal estate (*y*).

"If a testator who dies after 1867, wishes to give a direction which shall be deemed a declaration of an intention contrary to the rule laid down by Mr. Locke King's Act, it must be a direction applying to his

(*p*) *Nelson v. Page*, L. R. 7 Eq. 28.

(*q*) *Re Rossiter, Rossiter v. Rossiter*, 13 Ch. D. 855.

(*r*) *Elliott v. Dearsley*, 16 Ch. D. 322.

(*s*) *Sackville v. Smyth*, L. R. 17 Eq. 53.

(*t*) *Lewis v. Lewis*, L. R. 13 Eq. 219, 225, 227.

(*u*) *Newmarch v. Storr*, 9 Ch. D. 12.

(*x*) *Ibid.* 18; see *Re Bull, Catty v. Bull*, 31 W. R. 854.

(*y*) *Re Trevelyan, Perceval v. Trevelyan*, 26 Sol. J. 43.



mortgage debts in such terms as distinctly and unmistakably to refer to them." *Per GIFFARD, V.-C. (z).*

30 & 31  
Vict. c. 69,  
§ 2.

**2.** In the construction of the said Act and of this Act, the word "mortgage"<sup>1</sup> shall be deemed to extend to any lien for unpaid purchase-money<sup>2</sup> upon any lands or hereditaments purchased by a testator.

Mortgage  
includes  
vendor's  
lien.

<sup>1</sup> As to what is a "mortgage," see note 2 to s. 1 of Locke King's Act (a).

<sup>2</sup> Under the last-mentioned Act it was held that a vendor's lien was not equivalent to a mortgage (b).

An intestate died in 1863, seised of a mortgaged estate which had been conveyed to him by X., in consideration of his covenant to pay the mortgage affecting it, and also to pay a sum of 10,000*l.* secured by mortgage upon other real estate of X.; and it was held that the 10,000*l.* was equivalent to a vendor's lien, and was primarily payable out of the intestate's personal estate (c).

But a vendor's lien ranks as a mortgage for purposes of general administration (d); and LORD ROMILLY, M.R., considered that, as regards a legatee's right of marshalling, the distinction between a mortgage and a vendor's lien was untenable. Where a testator had purchased, but not paid for, an estate which passed under a general devise in his will, and his personal estate was exhausted in paying the purchase-money, his lordship, accordingly, held that the legatees had a lien upon the estate for their legacies (e).

Vendor's  
lien.

A testator, who died in 1860, gave all his leaseholds at X. to A., and his residuary estate to his other children. After the date of his will he agreed to buy other leaseholds at X., adjoining his own, and paid a deposit. It was held, that A. was entitled to the subsequently acquired leaseholds freed from liability in respect of unpaid purchase-money (f).

So far as the estates of persons dying between 31st December, 1867, and 31st December, 1877, are concerned, this section does not apply to cases of intestacy (g).

As regards persons dying after the latter date, the Act of 1877 places the estates of testators and intestates upon the same footing (h).

(z) *Nelson v. Page*, L. R. 7 Eq. 28.

(a) P. 138, *ante*.

(b) *Hood v. Hood*, 3 Jur. N.S. 684; *Barnwell v. Iremonger*, 1 Dr. & Sm. 242.

(c) *Day v. Day*, 14 W. R. 261.

(d) *Barnwell v. Iremonger*, 1 Dr. & Sm. 242.

(e) *Lord Lilford v. Powys-Keck*, L. R. 1 Eq. 347. See *Broadbent v. Groves*, p. 147, *post*.

(f) *Re Ord, Dickinson v. Dickinson*, 9 Ch. D. 667; 12 Ch. D. 22.

(g) *Harding v. Harding*, L. R. 13 Eq. 493.

(h) 40 & 41 Vict. c. 34.



30 & 31  
Vict. c. 69,  
§ 3.

3. This Act shall not extend to Scotland.

As to testators and intestates dying after 31st December, 1877, the law is further amended by the Exoneration of Charges Act, 1877, which is as follows:—

40 & 41 VICT. c. 34.

*An Act to amend the Acts seventeenth and eighteenth Victoria, chapter one hundred and thirteen, and thirtieth and thirty-first Victoria, chapter sixty-nine.*

Be it enacted, &c.

40 & 41  
Vict. c. 34,  
§ 1.

Locke  
King's  
Act ex-  
tended to  
estates of  
any tenure,  
and to in-  
testates.

1. The Acts mentioned in the Schedule<sup>1</sup> hereto shall as to any testator or intestate dying after the thirty-first December, one thousand eight hundred and seventy-seven,<sup>2</sup> be held to extend to a testator or intestate dying seised or possessed of or entitled to any land or other hereditaments of whatever tenure<sup>3</sup> which shall at the time of his death be charged with the payment of any sum or sums of money by way of mortgage, or any other equitable charge, including any lien for unpaid purchase-money;<sup>4</sup> and the devisee or legatee or heir shall not be entitled to have such sum or sums discharged or satisfied out of any other estate of the testator or intestate unless (in the case of a testator) he shall within the meaning of the said Acts have signified a contrary intention; and such contrary intention shall not be deemed to be signified by a charge of or direction for payment of debts upon or out of residuary real and personal estate or residuary real estate.<sup>5</sup>

<sup>1</sup> The following is the schedule referred to:—

SCHEDULE.

40 & 41  
Vict. c. 34,  
Schedule.

17 & 18 Vict. c. 113.

An Act to amend the law relating to the administration of the estates of deceased persons.

30 & 31 Vict. c. 69.

An Act to explain the operation of the Act 17 & 18 Vict. c. 113.

<sup>2</sup> It will be observed that this Act is not retrospective ; and therefore the law as settled by the decisions referred to in the preceding notes, ought still to be applied to the estates of persons dying before 31st December, 1877.

40 & 41  
Vict. c. 34,  
**§ 1.**

Not retro-  
spective.

<sup>3</sup> Before the passing of this Act it was decided that Locke King's Act does not apply to leaseholds (i).

But in a recent case the provisions of the Act of 1867 as amended by this Act were applied to the case of a testator who died in 1874. By will, made in 1874, he in effect empowered his trustees to pay off or reduce mortgages, and bequeathed three specified leasehold houses to his wife, and expressed his wish that if No. 44A, Wimpole Street (one of the three), should at the time of his death be incumbered, the incumbrances should be paid off. At his death, No. 44A, Wimpole Street, was not and had not been incumbered, but the other two houses bequeathed to his wife were. It was held that the wife must bear the mortgage on those two houses herself (k). But *Re Wormsley* does not appear to have been cited in this case.

<sup>4</sup> A vendor's lien will, therefore, be a charge within these Acts, as regards both testators and intestates dying after 31st December, 1877. See s. 2 of the Act of 1867, and notes thereto.

A testator died before completion of a contract which he had entered into for the purchase of certain real estate which he specifically devised. An action by the vendor for specific performance was compromised on the terms that he should retain the deposit and have his costs. The devisees of the real estate claimed from the testator's personal estate the difference between the deposit and the purchase-money, on the ground that the purchase was in equity a conversion of such purchase-money into realty. This claim was disallowed, for if the contract had been completed the unpaid purchase-money would have been payable by the devisees and not out of the personal estate (l).

<sup>5</sup> This clause settles the law in accordance with the view expressed by MALINS, V.-C., in *Lewis v. Lewis* (m), and extends the provision of the Act of 1867 to "residuary real and personal or residuary real estate" as well as personal estate.

40 & 41  
Vict. c. 34,  
**§ 2.**

Extent of  
Acts.

## 2. This Act shall not extend to Scotland.

(i) *Re Wormsley*, 4 Ch. D. 665.

(k) *Re Bull, Catty v. Bull*, 31 W. 24 Ch. D. 98.

R. 854.

(l) *Re Cockroft, Broadbent v. Groves*,

24 Ch. D. 98.

(m) L. R. 13 Eq. 219.

# THE ACT TO AMEND THE LAW OF REAL PROPERTY,

AS AMENDED BY THE

## CONTINGENT REMAINDERS ACT, 1877.

### CAP. CVI.

8 & 9 Vict.  
c. 106.

#### § 1.

*Repeal of  
so much of  
7 & 8 Vict.  
c. 76, as  
abolishes  
contingent  
remainders  
as from the  
commence-  
ment;  
and the  
residue as  
from 1st  
Oct. 1845.*

An Act to amend the Law of Real Property.

Be it enacted, &c.

*1. This section was repealed by 38 & 39 Vict. c. 66, s. 1. It merely repealed so much of 7 & 8 Vict. c. 76 as abolished contingent remainders from the commencement thereof, and the residue of that Act from the 1st of October, 1845.*

### CONVEYANCE BY "GRANT."

8 & 9 Vict.  
c. 106,  
§ 2.

*The im-  
mediate  
freehold of  
corporeal  
tenements  
to lie in  
grant as  
well as in  
livery.*

*Stamp duty  
on grants  
thereof*

*2. That after the said first day of October, one thousand eight hundred and forty-five, all corporeal tenements and hereditaments shall, as regards the conveyance of the immediate freehold thereof, be deemed to lie in grant as well as in livery; and that every deed which by force only of this enactment shall be effectual as a grant shall be chargeable with the stamp duty with which the same deed would have been chargeable in case the same had been a release founded on a lease or bargain and sale for a year, and also with the same stamp duty (exclusive of progressive duty) with which such lease or bargain and sale for a year would have been chargeable.*

The portion printed in italics of this section was repealed by 13 & 14 8 & 9 Vict. Vict. c. 97, s. 6 c. 106,

As to the unrepealed portion thereof see notes to s. 49 of the C. A. § 2.  
1881, p. 305, *post*.

## ASSURANCES BY DEED.

**3.** That a feoffment made after the said first day of 8 & 9 Vict. October, one thousand eight hundred and forty-five, other c. 106, than a feoffment made under a custom by an infant, shall § 3. be void at law, unless evidenced by deed; and that a par- Feoff- tition and an exchange of any tenements or hereditaments, titions, not being copyhold,<sup>1</sup> and a lease, required by law to be in exchanges, writing, of any tenements or hereditaments, and an assign- leases, as- ment of a chattel interest, not being copyhold, in any signments, and sur- tenements or hereditaments, and a surrender in writing of an renders required (subject to certain ex- interest in any tenements or hereditaments, not being a copy- ceptions) hold interest, and not being an interest which might by law to be by have been created without writing, made after the said first deed. day of October, one thousand eight hundred and forty-five, shall also be void at law, unless made by deed: Provided always, that the said enactment so far as the same relates to a release or a surrender shall not extend to Ireland.

<sup>1</sup> This section is repealed as to Ireland, by s. 104 of the Landlord and Tenant (Ireland) Act, 1860 (*a*), save so far as the same relates to feoffments, partitions and exchanges. Partly re-  
pealed as to  
Ireland.

As to England and Wales the practical effect of the latter part of this section, together with s. 3 of the Statute of Frauds (*b*), is to render void all leases and surrenders of leases for more than three years, and all assignments of leases, whether for less or more than three years, unless they are made by deed. But a contract of tenancy for a period of three years or upwards not by deed, though rendered void as a lease by this section, may be good as an agreement for a tenancy or for a lease (*c*), especially where it contains a provision for the preparation or execution of a lease (*d*). And it may therefore impose on the intended lessee a liability to pay the agreed rent, although he may never have entered into possession (*e*).

(a) 23 & 24 Vict. c. 154.

(b) 29 Car. II. c. 3.

(c) *Tidey v. Mollett*, 16 C. B. 2983;  
*Parker v. Tancell*, 6 W. R. 608;  
*Stranks v. St. John*, L. R. 2 C. P.

376.

(d) *Bond v. Rosling*, 1 Best & Sm. 371; 9 W. R. 746; *Rollason v. Leon*, 7 H. & N. 73.

(e) *Adams v. Hagger*, 4 Q. B. D. 480.

8 & 9 Vict.  
c. 106,  
**§ 3.**

Where  
document  
void as a  
lease  
creates  
tenancy  
from year  
to year.

And although it may be in such terms as, when followed by entry and payment of rent, only to create a valid tenancy from year to year, it may be looked at in order to ascertain the terms of such tenancy (*f*), *e.g.* as to payment of rent (*g*), or repairs (*h*).

An agreement under hand without seal by which A. agreed to let a house and premises to B. as tenant from year to year, and also further agreed to let B. remain tenant as long as he paid his rent and A had power to let, was held to be void as a lease and to confer on B. only a tenancy from year to year, determinable by a six months' notice to quit (*i*).

But a similar agreement between A. (who held under a lease) and B. without the words "so long as the lessor has power to let," although void at law as a lease, was held to entitle B. in equity to an underlease for the whole of A.'s term (*k*).

And it is now settled that an agreement confers and imposes upon both lessor and lessee the same rights and liabilities as if a lease in conformity with the agreement had been executed (*m*). Contrast *Drury v. Macnamara* (*n*), which would probably not now be followed. And a parol agreement for a lease, if properly proved, followed by part performance on the part of the intended lessee, may be enforced by him even against a corporation (*o*).

In some cases an instrument not under seal has been held to be divisible, and has been construed as a present demise for less than three years and an agreement for a lease for a longer period.

For instance, by an agreement not under seal, signed in January, L. agreed to let and R. agreed to take a house and land for the period of three years from Lady Day then next at a specified annual rent, payable quarterly. And it was agreed that a lease for the same should be executed and signed as soon as possible, subject to the permission of the landlord. And L. also agreed to let and R. agreed to take the said house, &c., from January up to Lady Day then next at the same rent and on the same terms. It was held that the agreement operated as an actual demise from January to Lady Day, and as an agreement for a lease from Lady Day for a term of three years, and consequently was not void (*p*).

An agreement for letting from February next until the following Midsummer "twelve months," with the right by a month's notice for the lessee to continue the holding for a further period of three and a half years, though not under seal, was held to be a divisible agreement contain-

(*f*) *Tress v. Savage*, 4 El. & Bl. 36.  
(*g*) *Lee v. Smith*, 9 Ex. 662.  
(*h*) *Ecclesiastical Commissioners v. Mirral*, L. R. 4 Ex. 162; *Martin v. Smith*, L. R. 9 Ex. 50.  
(*i*) *Wood v. Beard*, 2 Ex. D. 30.  
(*k*) *Re King's leasehold estates*, L. R. 16 Eq. 521; compare *Brown v.*

*Warner*, 14 Ves 156.

(*m*) *Taswell v. Parker*, 2 D. G. & J. 559; *Walsh v. Lonsdale*, 21 C. D. 9.  
(*n*) 5 El. & Bl. 612.

(*o*) *Crook v. Seaford*, L. R. 6 Ch. 557.

(*p*) *Rollason v. Leon*, 7 H. & N. 73.

ing an actual demise for a term less than three years, with a stipulation superadded, and therefore not void (*q*). 8 & 9 Vict. c. 106, § 3.

An assignment of a lease must be by deed (*r*). But an agreement by a lessee to underlet for the whole of his unexpired term (being less than three years) has been supported as a demise and held not to be an assignment (*s*).

4. That a feoffment made after the said first day of October, one thousand eight hundred and forty-five, shall not have any tortious operation; and that an exchange or a partition of any tenements or hereditaments, made by deed executed after the said first day of October, one thousand eight hundred and forty-five, shall not imply any condition in law; and that the word "give" or the word "grant" in a deed executed after the same day shall not imply any covenant in law in respect of any tenements or hereditaments, except so far as the word "give" or the word "grant" may by force of any Act of Parliament imply a covenant. 8 & 9 Vict. c. 106, § 4.

Feoffments not to operate by wrong, nor exchanges or partitions to imply any condition, or give and grant any covenant.

See notes to s. 49 of the C. A., 1881, p. 305, *post*.

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STRANGERS TO DEEDS.

5. That under an indenture executed after the first day of October, one thousand eight hundred and forty-five, an immediate estate or interest in any tenements or hereditaments, and the benefit of a condition or covenant respecting any tenements or hereditaments, may be taken, although the taker thereof be not named a party to the same indenture, also, that a deed executed after the said first day of October, one thousand eight hundred and forty-five, purporting to be an indenture, shall have the effect of an indenture, although not actually indented. 8 & 9 Vict. c. 106, § 5.

Strangers may take immediately under an indenture, and a deed purporting to be an indenture shall take effect as such.

(*q*) *Hand v. Hall*, 2 Ex. D. 318. 355.

(*r*) *Debenham v. Digby*, 21 W. R. 359.

(*s*) *Pollock v. Stacey*, 9 Q. B. 1033. But compare *Barrett v. Rolph*, 14 M. & W. 348.

## CONTINGENT INTERESTS ALIENABLE.

8 &amp; 9 Vict.

c. 106,

§ 6.

Contingent and other like interests, also rights of entry, made alienable by deed, saving estates in tail; and as regards married women enjoining conformity to 3 & 4 Will. 4, c. 74.

4 & 5 Will. 4, c. 92.

6. That, after the first day of October, one thousand eight hundred and forty-five, a contingent, an executory, and a future interest, and a possibility coupled with an interest, in any tenements or hereditaments of any tenure, whether the object of the gift or limitation of such interest or possibility be or be not ascertained,<sup>1</sup> also a right of entry, whether immediate or future, and whether vested or contingent, into or upon any tenements or hereditaments in England, of any tenure, may be disposed of by deed; but that no such disposition shall, by force only of this Act, defeat or enlarge an estate tail; and that every such disposition by a married woman shall be made conformably to the provisions, relative to dispositions by married women, of an Act passed in the third and fourth years of the reign of his late Majesty King William the Fourth, intituled "An Act for the Abolition of Fines and Recoveries, and for the Substitution of more simple Modes of Assurance," or in Ireland of an Act passed in the fourth and fifth years of the reign of his said late Majesty, intituled "An Act for the Abolition of Fines and Recoveries, and for the Substitution of more simple Modes of Assurance, in Ireland."

<sup>1</sup> This section does not repeal 32 Hen. VIII. c. 9.

Where a person entitled to a term of years died intestate, and his next-of-kin were allowed to remain in undisturbed possession for thirteen years, and then took out letters of administration and purported to sell the term, the conveyance thereof was held to be void (*s*).

A conveyance of a share of land of which the grantor had never been in possession, and in which he was merely entitled to a right of entry, was held good though at the time of the grant a litigation was pending as to the title of the grantor. And it was also held on appeal that though s. 2 of this Act does not repeal s. 2 of 32 Hen. VIII. c. 9, yet in this case the grant was not a dealing with a "pretenced" title (*t*).

A yearly tenancy "is either a present or a future interest in the land,

(*s*) *Williams v. Evans*, 1 C. B. 717.

(*t*) *Jenkins v. Jones*, 9 Q. B. D. 128.

and as such is assignable, if not at common law, at all events under the statute 8 & 9 Vict. c. 106, s. 6. If it is a present interest it is assignable at common law; if a future interest it is assignable under that statute." 8 & 9 Vict.  
c. 106,  
**§ 6.**

—*Per* JESSEL, M.R. (u).

As to a grant of a future interest, see *Boddington v. Robinson* (x), and cases there cited.

A right of entry on breach of condition is not within this section (y).

#### DISCLAIMER BY MARRIED WOMAN.

7. That, after the first day of October, one thousand eight hundred and forty-five, an estate or interest in any tenements or hereditaments in England, of any tenure, may be disclaimed by a married woman by deed; and that every such disclaimer shall be made conformably to the said provisions of the said Act for the abolition of fines and recoveries and for the substitution of more simple modes of assurance. 8 & 9 Vict.  
c. 106,  
**§ 7.**  
Capacity of married women to disclaim estates or interests by deed extended to England.

See notes to s. 5 of M. W. P. A., 1882 (z).

#### CONTINGENT REMAINDERS.

8. That a contingent remainder<sup>2</sup> existing at any time after the 31st day of December, 1844,<sup>1</sup> shall be, and, if created before the passing of this Act, shall be deemed to have been, capable of taking effect, notwithstanding the determination,<sup>3</sup> by forfeiture,<sup>4</sup> surrender,<sup>5</sup> or merger,<sup>6</sup> of any preceding estate of freehold, in the same manner in all respects as if such determination had not happened. 8 & 9 Vict.  
c. 106,  
**§ 8.**  
Contingent remainders protected as from 31st Dec., 1844, against the premature failure of a preceding estate.

<sup>1</sup> It will be observed that this section is so far retrospective as to include all contingent remainders existing after the 31st of December, Retro-spective.

(u) *Allcock v. Moorhouse*, 9 Q. B. D. 371.

(x) L. R. 10 Ex. 270.

(y) *Hunt v. Bishop*, 8 Ex. 675; *Hunt v. Remnant*, 9 Ex. 635.

(z) P. 361, *post*.



8 & 9 Vict. 1844, whether created before or after the passing of the Act to amend the law of real property (a). The "Act to amend the Law as to Contingent Remainders" of 1877 (b), is not retrospective.

c. 106,  
§ 8.

Distinction between vested and contingent remainders.

Old law.

Contingent remainders formerly liable to destruction.

<sup>2</sup> A vested remainder is one which is ready to take immediate effect, on the determination of the prior particular estate; while a contingent remainder is one which can only take effect in case some other event happens before or simultaneously with, such determination.

Formerly it was "not only necessary that a vested legal freehold estate should precede a legal freehold contingent remainder, but some such preceding freehold estate must subsist and endure until the time when the contingent remainder vests; that is, until the time when the contingency comes to pass; for it was a general rule that every remainder must vest, either during the particular estate, or else at the very instant of its determination" (c). It followed, from this rule, that all legal remainders which were still contingent when the prior particular estate determined were destroyed, and the next remainder then vested took effect.

But the rule—being founded upon the feudal rule, that the freehold could never be vacant—did not apply to equitable contingent remainders (d). And, therefore, where the legal estate of freehold is vested in trustees (e), or outstanding in a mortgagee (f), an equitable contingent remainder will take effect notwithstanding the prior termination of the previous estate, if it does not infringe the equitable rules against perpetuity (g). "Where the legal fee is outstanding in the trustees, that doctrine of contingent remainders, which, until the recent statute, prevented contingent remainders from taking effect at all unless they were vested at the moment of the termination of the prior estate in freehold, has no operation."—*Per JESSEL, M.R. (h)*.

<sup>3</sup> The prior particular estate might determine prematurely by—

- (a) Forfeiture,
- (β) Surrender, or
- (γ) Merger,

or it might expire naturally.

Forfeiture of prior estate.

<sup>4</sup> Forfeiture was usually caused by the owner of the particular estate making a feoffment, levying a fine, or suffering a recovery; but it might also be incurred in other ways. Forfeiture by feoffment was abolished by the "Act to amend the Law of Real Property" (i), s. 4 of

(a) 8 & 9 Vict. c. 106.

(b) 40 & 41 Vict. c. 33, *post*, p. 155.

(c) *Fearne C. R.*, 10th ed., 307.

(d) *Abbis v. Burney*, 17 Ch. D. 211.

(e) *Berry v. Berry*, 7 Ch. D. 657.

(f) *Astley v. Micklethwait*, 15 Ch. D. 59.

(g) *Abbis v. Burney*, 17 Ch. D. 211.

(h) *Ibid.*, 230.

(i) 8 & 9 Vict. c. 106.

which provides that a feoffment shall not have any tortious operation, while fines and recoveries were abolished by 3 & 4 Wm. 4, c. 74, which was passed in 1833. 8 & 9 Vict.  
c. 106,  
**§ 8.**

The case of forfeiture by any other means is provided for by s. 8 of this Act.

<sup>5</sup> A surrender of a particular estate to the owner of a vested remainder determined the particular estate and consequently destroyed all intermediate contingent remainders. This case is also provided for by s. 8 of the "Act to amend the Law of Real Property." Surrender  
of prior  
estate.

<sup>6</sup> When the particular estate and the ultimate remainder in fee became vested in the same person, the former was merged in the fee simple, and the effect as regards contingent remainders was the same as a surrender. This case is also provided for by the last-mentioned enactment. Merger of  
prior  
estate.

The device of limiting estates to trustees to preserve contingent remainders, in case of the *premature failure* of the prior particular estate, was thus rendered unnecessary.

But contingent remainders which had not become vested on the *natural termination* of the prior particular estate were still destroyed (*k*), except when the contingency was the birth of a child *en ventre sa mère* at the termination of the prior estate, which case is provided for by 10 & 11 Wm. 3, c. 16. Natural  
expiration  
of prior  
estate.

The law has now been altered by the "Act to amend the Law as to Contingent Remainders" (*l*), which was passed on the 2nd of August, 1877, and the enacting part of which is as follows:— New en-  
actment.

[1. Every contingent remainder created by any instrument executed after the passing of this Act, or by any will or codicil revived or republished by any will or codicil executed after that date,<sup>1</sup> in tenements or hereditaments of any tenure, which would have been valid as a springing or shifting use or executory devise or other limitation had it not had a sufficient estate to support it as a contingent remainder,<sup>2</sup> shall, in the event of the particular estate determining before the contingent remainder vests,<sup>3</sup> be capable of taking effect in all respects as if the contingent remainder had originally been created as a 40 & 41  
Vict. c. 33,  
**§ 1.**  
Cases in  
which con-  
tingent re-  
mainders  
capable of  
taking  
effect.

(*k*) *Cunliffe v. Brancker*, 3 Ch. D. 393; *Brackenbury v. Gibbons*, 2 Ch. D. 417; *Perceval v. Perceval*, L. R. 9 Eq. 386; *Holmes v. Prescott*, 12 W. R. 636; *Festing v. Allen*, 12 M. & W. 279. (l) 40 & 41 Vict. c. 33.

8 & 9 Vict.  
c. 106,  
§ 8.

40 & 41  
Vict. c. 83,  
§ 1.

Not retro-  
spective.  
Distinc-  
tion be-  
tween  
springing  
use and  
contingent  
remainder.

Effect of  
Act of  
1877.

springing or shifting use or executory devise or other  
executory limitation.<sup>4]</sup>

<sup>1</sup> It will be observed that this enactment is not retrospective. The old law will, consequently, apply to contingent remainders created before the 2nd of August, 1877.

<sup>2</sup> "A springing or shifting use or an executory devise differs from a contingent remainder, not only as an equitable necessarily differs from a legal estate, but also in this, that instead of depending on a preceding particular estate and co-existing with it as an ulterior part of the same fee simple, it springs up independently at a distance of time, in defiance rather than evasion of the rule, that the operation of every conveyance must be immediate; or at least if it did depend upon a particular estate it was upon one of a new kind, unknown, as such, to the law: namely, a fee simple of limited duration, which the common law might allow to subsist by itself, but would by no means admit of a remainder after it, because a fee simple was the greatest possible estate; and whatever qualifications might be annexed to it, it was a fee simple still. But, without regard to such technical scruples, it was settled that, in equity, a deferred or future interest might be created in the first instance; the grantor retaining or a third person taking, not a particular estate, as for a certain number of years, for life, or in tail, but the entire inheritance determinable only upon the happening of that event (if it happened at all) upon which the future interest (called a springing or shifting use) was to arise" (*m*).

The rule has, hitherto, been that no limitation which could be construed as a contingent remainder (*i.e.* which was supported by a prior particular estate) should be construed as a springing or shifting use, or an executory devise (*n*). The effect of this enactment is to reverse that rule.

Where real estate was in 1828 devised to trustees and their heirs upon trust to pay the rents to A. for life, then upon trust to retain the rents for their own use during the life of H., and after H.'s death upon trust to convey unto such son of M. as should first attain the age of twenty-five years, it was held that the gift to M.'s son was not an equitable contingent remainder, but an executory devise, and, inasmuch as it could not take effect within a life or lives in being at the death of the testator and twenty-one years afterwards, void for remoteness. Assuming it to have been an equitable remainder, it would still have been void for remoteness (*o*). By a will executed in 1846 real estate was devised to A. for life with remainder to such of her children as either before or after her decease should attain twenty-one. It was held that the gift to children

(*m*) Burton, R. P., 5th ed., 39—40. Eden. 27.

(*n*) *Carwardine v. Carwardine*, 1 (*o*) *Abbis v. Burney*, 17 Ch. D. 211

who attained twenty-one after the death of A. could not possibly take effect as a remainder, and must be construed as an executory devise (p). 8 & 9 Vict. c. 106, § 8.

"The rule is that you construe every limitation, if you possibly can, as a remainder rather than an executory devise. It is a harsh rule: why should I extend it? Why should a gift which cannot possibly take effect as a remainder not take effect as an executory devise? I see no good reason why it should not."—*Per* JESSEL, M.R. (q). 40 & 41 Vict. c. 33, § 1.

<sup>3</sup> This provides for the determination of the particular estate, by whatever means. See notes to 8 & 9 Vict. c. 106, s. 8 (r).

<sup>4</sup> A legal contingent remainder expectant on an estate tail could never be void on the ground of remoteness (s); but a springing or shifting use or executory devise must take effect within twenty-one years after the expiration of specified existing lives (with an allowance for gestation if it actually exists (t)). And any executory estate which might possibly infringe this rule is absolutely void. Application of rule against remoteness to cases under Act of 1877.

The effect of this Act is to apply the last-mentioned rule to contingent remainders which depend upon it for their validity. For such contingent remainders are to take effect only in case they would have been valid as executory estates. See also the new enactment as to executory estates in s. 10 of the C. A., 1882 (u).

REVERSION ON LEASE.

9. That when the reversion expectant on a lease, made either before or after the passing of this Act, of any tenements or hereditaments, of any tenure, shall, after the said first day of October, one thousand eight hundred and forty-five, be surrendered or merge, the estate which shall for the time being confer as against the tenant under the same lease the next vested right to the same tenements or hereditaments, shall, to the extent and for the purpose of preserving such incidents to, and obligations on, the same reversion, as, but for the surrender or merger thereof, would have subsisted, be deemed the reversion expectant on the same lease. 8 & 9 Vict. c. 106, § 9. When the reversion on a lease is gone the next estate to be deemed the reversion.

See notes to s. 10 of C. A., 1881, p. 233, *et seq.*, *post*.

10. That this Act shall not extend to Scotland.

(p) *Re Lechmere & Lloyd*, 18 Ch. D. 524; compare *Miles v. Jarvis*, W. N. (1883) 146.

(q) *Re Lechmere & Lloyd*, 18 Ch. D. 529.

(r) *Ante*, p. 154.

(s) *Cole v. Sewell*, 4 Dr. & War. 1; 2 H. L. C. 1—28; Sugd., R. P., 116—121.

(t) *Bengough v. Edridge*, 1 Sim. 173; *Cadell v. Cadell*, 1 Cl. & F. 372.

(u) 45 & 46 Vict. c. 39, p. 233, *post*.

8 & 9 Vict. c. 106, § 10.

Act not to extend to Scotland.

# LORD ST. LEONARDS' ACT, 1859,

AS AMENDED BY

## LORD ST. LEONARDS' ACT, 1860.

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22 & 23 VICT. c. 35.

*An Act to further Amend the Law of Real Property and to  
relieve Trustees.*

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### LEASES—EFFECT OF LICENCE.

22 & 23  
Vict. c. 35,  
§ 1.

Restric-  
tion on  
effect of  
licence to  
alien.

1. Where any licence to do any act which without such licence would create a forfeiture, or give a right to re-enter, under a condition or power reserved in any lease heretofore granted, or to be hereafter granted, shall at any time after the passing of this Act be given to any lessee or his assigns, every such licence shall, unless otherwise expressed, extend only to the permission actually given, or to any specific breach of any proviso or covenant made or to be made, or to the actual assignment, under-lease, or other matter thereby specifically authorized to be done, but not so as to prevent any proceeding for any subsequent breach (unless otherwise specified in such licence); and all rights under covenants and powers of forfeiture and re-entry in the lease contained shall remain in full force and virtue, and shall be available as against any subsequent breach of covenant or condition, assignment, under-lease, or other matter not specifically authorized or made dispunishable by such licence, in the same manner as if no such licence had

been given; and the condition or right of re-entry shall be and remain in all respects as if such licence had not been given, except in respect of the particular matter authorized to be done.

22 & 23  
Vict. c. 35,  
§ 1.

A similar provision as to waiver of the benefit of any covenant or condition is contained in s. 6 of Lord St. Leonards' Act, 1860, which is as follows:—

[6. Where any actual waiver of the benefit of any covenant or condition in any lease on the part of any lessor, or his heirs, executors, administrators, or assigns, shall be proved to have taken place after the passing of this Act in any one particular instance, such actual waiver shall not be assumed or deemed to extend to any instance or any breach of covenant<sup>1</sup> or condition other than that to which such waiver shall specially relate, nor to be a general waiver of the benefit of any such covenant or condition, unless an intention to that effect shall appear.]

23 & 24  
Vict. c. 38,  
§ 6.  
Restriction of  
effect of  
waiver.

Where a landlord waived the benefit of a condition of re-entry for breach of covenant to keep the property insured by paying the unpaid premiums himself and accepting repayment from the tenant, the Court refused to relieve the tenant under ss. 4 to 6 of Lord St. Leonards' Act, 1860, against forfeiture for a subsequent breach (a).

<sup>1</sup> As to the present law with regard to breach of covenant, see s. 12 of C. A., 1881, *post*, p. 235, and notes thereto.

2. Where in any lease heretofore granted or to be hereafter granted there is or shall be a power or condition of re-entry on assigning or underletting or doing any other specified act without licence, and a licence at any time after the passing of this Act shall be given to one of several lessees or co-owners to assign or underlet his share or interest, or to do any other act prohibited to be done without licence, or shall be given to any lessee or owner, or any one of several lessees or owners, to assign or underlet part only of the property, or to do any other such act as aforesaid in respect of part only of such

22 & 23  
Vict. c. 35,  
§ 2.  
Restricted  
operation  
of partial  
licences.

(a) *Mills v. Griffiths*, 45 L. J. 772.

22 & 23  
Vict. c. 35,  
§ 2.

property, such licence shall not operate to destroy or extinguish the right of re-entry in case of any breach of the covenant or condition by the co-lessee or co-lessees, or owner or owners, of the other shares or interests in the property, or by the lessee or owner of the rest of the property (as the case may be) over or in respect of such shares or interests or remaining property, but such right of re-entry shall remain in full force over or in respect of the shares or interests or property not the subject of such licence.

22 & 23  
Vict. c. 35,  
§ 3.

Apportion-  
ment of  
conditions  
of re-entry  
in certain  
cases.

3. Where the reversion upon a lease is severed, and the rent or other reservation is legally apportioned, the assignee of each part of the reversion shall in respect of the apportioned rent or other reservation allotted or belonging to him, have and be entitled to the benefit of all conditions or powers of re-entry for non-payment of the original rent or other reservation, in like manner as if such conditions or powers had been reserved to him as incident to his part of the reversion in respect of the apportioned rent or other reservation allotted or belonging to him.<sup>1</sup>

<sup>1</sup> See s. 12 of C. A., 1881, and note thereto (b).

#### POLICIES OF INSURANCE.

22 & 23  
Vict. c. 35,  
§ 4.

Relief  
against  
forfeiture  
for breach  
of covenant  
to insure  
in certain  
cases.

4. *A Court of Equity shall have power to relieve against a forfeiture for breach of a covenant or condition to insure against loss or damage by fire, where no loss or damage by fire has happened, and the breach has, in the opinion of the Court, been committed through accident or mistake, or otherwise without fraud or gross negligence, and there is an insurance on foot at the time of the application to the Court in conformity with the covenant to insure, upon such terms as to the Court may seem fit.*

22 & 23  
Vict. c. 35,  
§ 5.

When re-  
lief granted  
the same to  
be recorded

5. *The Court, where relief shall be granted, shall direct a record of such relief having been granted to be made by indorsement on the lease or otherwise.*

(b) P. 235, post.



**6.** *The Court shall not have power under this Act to relieve the same person more than once in respect of the same covenant or condition; nor shall it have power to grant any relief under this Act where a forfeiture under the covenant in respect of which relief is sought shall have been already waived out of court in favour of the person seeking the relief.*

22 & 23  
Vict. c. 35,  
§ 6.

Court not to relieve any person more than once in respect of the same covenant, &c.

**7.** *The person entitled to the benefit of a covenant on the part of a lessee or mortgagor to insure against loss or damage by fire shall, on loss or damage by fire happening, have the same advantage from any then subsisting insurance relating to the building covenanted to be insured, effected by the lessee or mortgagor in respect of his interest under the lease or in the property, or by any person claiming under him, but not effected in conformity with the covenant, as he would have from an insurance effected in conformity with the covenant.*

22 & 23  
Vict. c. 35,  
§ 7.

Lessor to have benefit of an informal insurance.

**8.** *Where, on the bonâ fide purchase after the passing of this Act of a leasehold interest under a lease containing a covenant on the part of the lessee to insure against loss or damage by fire, the purchaser is furnished with the written receipt of the person entitled to receive the rent, or his agent, for the last payment of rent accrued due before the completion of the purchase, and there is subsisting at the time of the completion of the purchase an insurance in conformity with the covenant, the purchaser or any person claiming under him shall not be subject to any liability, by way of forfeiture or damages or otherwise, in respect of any breach of the covenant committed at any time before the completion of the purchase, of which the purchaser had not notice before the completion of the purchase; but this provision is not to take away any remedy which the lessor or his legal representatives may have against the lessee or his legal representatives for breach of covenant.*

22 & 23  
Vict. c. 35,  
§ 8.

Protection of purchaser against forfeiture under covenant for insurance against fire in certain cases.

**9.** *The preceding provisions shall be applicable to leases for a term of years absolute, or determinable on a life or lives or otherwise, and also to a lease for the life of the lessee or the life or lives of any other person or persons.*

23 & 23  
Vict. c. 35,  
§ 9.

Preceding provisions to apply to leases for a term of years absolute, &c.



**22 & 23** Sects. 4 to 9 inclusive are repealed by s. 14 of the C. A. 1881 (*d*),  
**Vict. c. 35,** which contains ampler substituted provisions. See that section and  
**§ 9.** notes thereto (*e*).

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### RENTCHARGES.

**22 & 23** **10.** The release from a rentcharge of part of the heredita-  
**Vict. c. 35,** ments charged therewith shall not extinguish the whole rent-  
**§ 10.** charge, but shall operate only to bar the right to recover any  
 Release of part of land charged not to be an extin-  
 guishment. part of the rentcharge out of the hereditaments released,  
 without prejudice nevertheless to the rights of all persons  
 interested in the hereditaments remaining unreleased, and  
 not concurring in or confirming the release.

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### JUDGMENTS.

**22 & 23** **11.** The release from a judgment of part of any heredita-  
**Vict. c. 35,** ments charged therewith shall not affect the validity of the  
**§ 11.** judgment as to the hereditaments remaining unreleased, or as  
 Release of part of land charged not to affect judgment. to any other property not specifically released, without preju-  
 dice nevertheless to the rights of all persons interested in the  
 hereditaments or property remaining unreleased, and not con-  
 curring in or confirming the release.

The following section was inserted in the Irish Incumbered Estates Act, 1848 (*f*), in order to remove doubts whether the above section applied to Ireland.

**11 & 12** [72. And whereas doubts are entertained whether, when a  
**Vict. c. 48,** judgment affects lands in Ireland, and when the person  
**§ 72.** entitled to such judgment is willing to release a portion  
 of such lands in order to the sale thereof, or otherwise, he  
 can grant such release without nullifying the effect or  
 validity of such judgment upon the residue thereof, or any

(*d*) 44 & 45 Vict. c. 41.  
 (*e*) Page 237, *post*.

(*f*) 11 & 12 Vict. c. 48.

other property which it is intended should remain subject to such judgment: And whereas it is expedient that such doubts be removed: Be it enacted, that the release of any portion of lands in Ireland from any judgment affecting the same shall not operate or be construed to extend or operate so as to nullify or in any manner to affect the validity and force of such judgment as regards the residue of such lands or any other property not especially released from such judgment, but that such judgment shall continue to affect such residue or other property, notwithstanding such release, in like manner and with the like powers to enforce payment of interest and principal and to all intents and purposes, as if such deed of release had not been executed.]

22 & 23  
Vict. c. 35,  
§ 11.  
11 & 12  
Vict. c. 48,  
§ 72.

POWERS.

12. A deed hereafter executed in the presence of and attested by two or more witnesses in the manner in which deeds are ordinarily executed and attested shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by deed or by any instrument in writing not testamentary, notwithstanding it shall have been expressly required that a deed or instrument in writing made in exercise of such power should be executed or attested with some additional or other form of execution or attestation or solemnity: Provided always, that this provision shall not operate to defeat any direction in the instrument creating the power that the consent of any particular person shall be necessary to a valid execution, or that any act shall be performed in order to give validity to any appointment, having no relation to the mode of executing and attesting the instrument, and nothing herein contained shall prevent the donee of a power from executing it conformably to the power by writing or otherwise than by an instrument executed and attested as an ordinary deed, and to any such execution of a power this provision shall not extend.

22 & 23  
Vict. c. 35,  
§ 12.  
Mode of  
execution  
of powers.

22 & 23  
Vict. c. 35,  
§ 13.

Sale under  
power not  
to be  
avoided by  
reason of  
mistaken  
payment  
to tenant  
for life.

**13.** Where under a power of sale a *bonâ fide* sale shall be made of an estate with the timber thereon, or any other articles attached thereto, and the tenant for life or any other party to the transaction shall by mistake be allowed to receive for his own benefit a portion of the purchase money as the value of the timber or other articles, it shall be lawful for the Court of Chancery, upon any bill or claim or application in a summary way, as the case may require or permit, to declare that upon payment by the purchaser, or the claimant under him, of the full value of the timber and articles at the time of sale, with such interest thereon as the Court shall direct, and the settlement of the said principal moneys and interest under the direction of the Court upon such parties as in the opinion of the Court shall be entitled thereto, the said sale ought to be established; and upon such payment and settlement being made accordingly the Court may declare that the said sale is valid, and thereupon the legal estate shall vest and go in like manner as if the power had been duly executed, and the costs of the said application as between solicitor and client shall be paid by the purchaser or the claimant under him.

22 & 23  
Vict. c. 35,  
§ 14.

Devisee in  
trust may  
raise  
money by  
sale, not-  
withstand-  
ing want  
of express  
power in  
the will.

**14.** Where by any will which shall come into operation after the passing of this Act the testator shall have charged his real estate or any specific portion thereof with the payments of his debts,<sup>1</sup> or with the payment of any legacy or other specific sum of money, and shall have devised the estate so charged to any trustee or trustees for the whole of his estate or interest therein, and shall not have made any express provision for the raising of such debt, legacy, or sum of money out of such estate, it shall be lawful for the said devisee or devisees in trust, notwithstanding any trusts actually declared by the testator, to raise such debts, legacy, or money as aforesaid by a sale and absolute disposition by public auction or private contract of the said hereditaments or any part thereof, or by a mortgage<sup>2</sup> of the same, or partly in one mode and partly in the other, and any deed or deeds of mortgage so executed may reserve such rate of interest and

fix such period or periods of repayment as the person or persons executing the same shall think proper.

22 & 28  
Vict. c. 35,  
§ 14.

<sup>1</sup> As to what amounts to a charge of debts, see Dart (*g*); Williams on Executors (*h*); Jarman on Wills (*i*); Theobald on Wills (*k*).

<sup>2</sup> Although it was at one time doubted (*l*), it is now settled that a power to mortgage authorises the insertion in the mortgage of the usual power of sale on default (*m*), and that such power of sale will be valid either in the case of an ordinary mortgage (*n*) or in the case of a mortgage to a building society (*o*).

Power to mortgage authorises insertion of power for mortgages to sell.

**15.** The powers conferred by the last section shall extend to all and every person or persons in whom the estate devised shall for the time being be vested by survivorship, descent, or devise, or to any person or persons who may be appointed under any power in the will, or by the Court of Chancery, to succeed to the trusteeship vested in such devisee or devisees in trust as aforesaid.

22 & 28  
Vict. c. 35,  
§ 15.

Powers given by last section extended to survivors, devisees, &c.

**16.** If any testator who shall have created such a charge as is described in the fourteenth section shall not have devised the hereditaments charged as aforesaid in such terms

22 & 28  
Vict. c. 35,  
§ 16.

as that his whole estate and interest therein shall become vested in any trustee or trustees,<sup>1</sup> the executor or executors for the time being named in such will (if any) shall have the same or the like power of raising the said moneys as is hereinbefore vested in the devisee or devisees in trust of the said hereditaments, and such power shall from time to time devolve to and become vested in the person or persons (if any) in whom the executorship shall for the time being be vested;<sup>2</sup> but any sale or mortgage under this Act shall operate only on the estate and interest, whether legal or equitable, of the testator, and shall not render it unnecessary to get in any outstanding subsisting legal estate.

Executors to have power of raising money, &c. where there is no sufficient devise.

<sup>1</sup> In a recent case a testator, who died in 1871, directed his executor

(*g*) V. & P., 5th ed., 616.

(*h*) 8th ed., 660.

(*i*) 4th ed., vol. 2, p. 585, *et seq.*

(*k*) 2nd ed. 631.

(*l*) *Clarke v. Royal Panopticon*, 4 Dr. 26.

(*m*) *Bridges v. Longman*, 24 B. 27.

(*n*) *Re Chawner's Will*, L. R. 8 Eq. 569.

(*o*) *Cruikshank v. Duffin*, L. R. 13 Eq. 555.

22 & 23  
Vict. c. 35,  
**§ 16.**

and executrix to pay all his just debts. In a subsequent part of his will he devised to his wife and son all his real estates upon trust for his wife for life, and after her death upon trust to raise and pay certain legacies. And he gave his residuary estate to his son after the death of his wife, and appointed his wife executrix and his son executor. It was held by the Court of Appeal that the executors took the whole legal fee as joint tenants, and could sell for payment of debts without the concurrence of the legatees (*o*).

<sup>2</sup> If the executors renounce, the power conferred by this section cannot be exercised by an administrator with the will annexed (*p*).

22 & 23  
Vict. c. 35,  
**§ 17.**

Purchasers,  
&c., not  
bound to  
inquire as  
to powers.

**17.** Purchasers or mortgagees shall not be bound to inquire whether the powers conferred by sections fourteen, fifteen, and sixteen of this Act, of either of them, shall have been duly and correctly exercised by the person or persons acting in virtue thereof.<sup>1</sup>

<sup>1</sup> On a sale by executors, thirteen years (*q*), twenty-five years (*r*), twenty-six years (*s*), and even thirty-three years (*t*) after the death of the testator, it has been held that the purchaser need not inquire whether any debts remained unpaid. But as a lapse of twenty years is sufficient to bar mortgage debts and other specialty debts, a presumption arises, at the end of that time that all debts are paid—especially if a beneficiary is in possession (*u*). It has accordingly been laid down by the Court of Appeal that in the absence of special circumstances no inquiry need be made on a sale within twenty years from the testator's death, but on a sale after that period has expired, the question should be asked (*x*).

22 & 23  
Vict. c. 35,  
**§ 18.**

Sects.  
14, 15 and  
16 not to  
affect cer-  
tain sales,  
&c., nor to  
extend to  
devises in  
fee or in  
tail.

**18.** The provisions contained in sections fourteen, fifteen, and sixteen shall not in any way prejudice or affect any sale or mortgage already made or hereafter to be made, under or in pursuance of any will coming into operation before the passing of this Act, but the validity of any such sale or mortgage shall be ascertained and determined in all respects as if this Act had not passed;<sup>1</sup> and the said several sections shall not extend to a devise<sup>2</sup> to any person or persons in fee or in tail, or for the testator's whole estate and interest

(*o*) *Re Tanqueray-Willaume & Landau*, 20 Ch. D. 465.

(*p*) *Re Clay & Tetley*, 16 Ch. D. 3.

(*q*) *Greetham v. Colton*, 34 B. 615.

(*r*) *Forbes v. Peacock*, 12 Sim. 528.

(*s*) *Sabin v. Heape*, 27 B. 553.

(*t*) *Wrigley v. Sykes*, 21 B. 337.

(*u*) *Stroughill v. Anstey*, 1 D. M. G. 654.

(*x*) *Re Tanqueray-Willaume & Landau*, 20 Ch. D. 465.

charged with debts or legacies, nor shall they affect the power of any such devisee or devisees to sell or mortgage as he or they may by law now do.

22 & 23  
Vict. c. 35,  
**§ 18.**

The rule with regard to wills coming into operation before the 13th of August, 1859, was enunciated by LORD CRANWORTH, C., as follows:—

“Where there is a general charge of debts and no legal estate given, it may be that, as against the heir at law, executors may sometimes, perhaps always, possess impliedly a power to convey the legal estate in order to satisfy the charge; but that doctrine certainly does not apply to the case where the estate is devised to others or to another, charged with certain payments of debts or legacies: then that money is to be raised through the instrumentality of a sale by the devisee, and that devisee is the person, and the only person, that can make a legal title.” *Per* LORD CRANWORTH, C. (y).

Law under  
wills of  
testators  
dying  
before 13  
August,  
1859.

And this appears to be the rule whether the devise is to the executors (a), or one of the executors (b), or to some other person (c).

Whether  
sale by  
executors  
or by  
devisee.

The power of sale was held to be exerciseable by trustees to whom real estate was devised upon certain trusts during the lives of beneficiaries, and at their deaths upon trust for sale and distribution (d); and where the devise was to trustees during the life of a married woman upon trust for her for her separate use, with remainder to her heir (e). But in the case of a devise for life with contingent remainders over, it was held that the executors and not the devisee could sell for payment of debts (f). In that and other cases (g) a charge of debts was alone considered sufficient to give an implied power of sale to the executors. On the other hand, it was held that executors had no power to sell or mortgage land which but for the charge of debts would have descended to the heir (h). The land was held to descend to the heir subject to the charge which, it was then said, could only be enforced in equity. But, in a subsequent case, where land was devised to a trustee in trust for sale and (among other things) payment of debts, and the trustee disclaimed, it was held that the heir could sell for payment of debts (i), though the general rule is that where trustees disclaim real estate devised to them, the heir cannot execute any trusts reposed in, or exercise any powers

(y) *Oolyer v. Finch*, 5 H. L. C. 905—922.

(a) *Page v. Adam*, 4 B. 269; *Greet-ham v. Colton*, 34 B. 615.

(b) *Corser v. Cartwright*, L. R. 8 Ch. 971.

(c) *Eidsforth v. Armstead*, 2 K. & J. 388; *Hodkinson v. Quinn*, 1 J. & H. 303.

(d) *Hodkinson v. Quinn*, 1 J. & H. 303.

(e) *Eidsforth v. Armstead*, 2 K. & J. 383.

(f) *Robinson v. Lomater*, 5 D. M. G.

(g) *Bolton v. Stannard*, 4 Jur. N. S. 576; *Wrigley v. Sykes*, 21 B. 337.

(h) *Jones v. Hughes*, 6 Ex. 223.

(i) *Austin v. Martin*, 29 B. 523.

22 & 23  
Vict. c. 35,  
**§ 18.** conferred upon, the trustees which require the exercise of discretion, *e.g.* the granting of a lease (*j*).

<sup>2</sup> The word "devise," here, evidently means only a beneficial devise.

### INHERITANCE.

22 & 23  
Vict. c. 35,  
**§ 19.** **19.** Where there shall be a total failure of heirs of the purchaser, or where any land shall be descendible as if an ancestor had been the purchaser thereof, and there shall be a total failure of the heirs of such ancestor, then and in every such case the land shall descend and the descent shall thenceforth be traced from the person last entitled to the land as if he had been the purchaser thereof.

Descent  
how to be  
traced.

22 & 23  
Vict. c. 35,  
**§ 20.** **20.** The last preceding section shall be read as part of the Act "for the amendment of the Law of Inheritance," of the session of the third and fourth years of the reign of King William the Fourth, chapter one hundred and six.

Preceding  
section in-  
corporated  
with 3 & 4  
Will. IV.  
c. 106.

### ASSIGNMENT OF PERSONALTY.

22 & 23  
Vict. c. 35,  
**§ 21.** **21.** Any person shall have power to assign personal property now by law assignable, including chattels real, directly to himself and another person or other persons or corporation, by the like means as he might assign the same to another.

Assign-  
ment to  
self  
and others.

See s. 50 of C. A. 1881, and notes thereto (*k*).

### REGISTRATION OF CROWN DEBTS.

22 & 23  
Vict. c. 35,  
**§ 22.** **22.** From and after the thirty-first day of December, one thousand eight hundred and fifty-nine, the provision for registry of judgments, decrees, or orders, rules or orders, contained in the Act of the session of the second and third

After Dec.  
31, 1859,  
provision

(*j*) *Robson v. Flight*, 13 W. R. 195, 363.

(*k*) Page 306, *post*.

years of Queen Victoria, chapter eleven, as explained and amended by the Act of the session of the eighteenth and nineteenth years of Queen Victoria, chapter fifteen, shall extend and apply to every such judgment, statute, recognisance, inquisition, obligation, specialty, or acceptance of office as is by section eight of the first-mentioned Act required to be registered, so that it shall be obligatory on the Crown, in order to bind the lands, tenements, or hereditaments of its debtors or accountants, as against purchasers, mortgagees, or creditors becoming such after the thirty-first day of December, one thousand eight hundred and fifty-nine, to re-register, in like manner as it is obligatory on a private person, so that notice of any such judgment, statute, recognisance, inquisition, obligation, specialty, or acceptance of office, not duly re-registered, shall not avail against purchasers, mortgagees, or creditors becoming such after the thirty-first day of December, one thousand eight hundred and fifty-nine, as to lands, tenements, or hereditaments; and this provision shall apply to every such judgment, statute, recognisance, inquisition, obligation, specialty, or acceptance of office as since the passing of the first-mentioned Act has been registered under the provisions therein contained, or as shall hereafter be so registered. This section shall not extend to Ireland.

22 & 23  
Vict. c. 35,  
§ 22.

as to re-  
registry,  
contained  
in 2 & 3  
Vict. c. 11,  
and 18 &  
19 Vict.  
c. 15, to  
apply to  
Crown  
debts.

### RECEIPTS OF MORTGAGEES, &c.

**23.** The *bond fide* payment to and the receipt of any person to whom any purchase or mortgage money shall be payable upon any express or implied trust shall effectually discharge the person paying the same from seeing to the application or being answerable for the misapplication thereof, unless the contrary shall be expressly declared by the instrument creating the trust or security.

22 & 23  
Vict. c. 35,  
§ 23.

Not to be  
bound to  
see to the  
application  
of pur-  
chase  
money.

See s. 36 of C. A. 1881, and notes thereto (l).

(l) Page 287, *post*.



## CONCEALMENT OF DEEDS FROM PURCHASER.

22 & 23  
Vict. c. 35,  
§ 24.

Punish-  
ment of  
vendor,  
&c., for  
fraudulent  
conceal-  
ment of  
deeds, &c.,  
or falsi-  
fying  
pedigree.

**24.** Any seller or mortgagor of land, or of any chattels, real or personal, or choses in action conveyed or assigned to a purchaser, or the solicitor or agent of any such seller or mortgagor, who shall after the passing of this Act conceal any settlement, deed, will, or other instrument material to the title or any incumbrance<sup>1</sup> from the purchaser, or falsify any pedigree upon which the title does or may depend, in order to induce him to accept the title offered or produced to him, with intent in such cases to defraud, shall be guilty of a misdemeanour, and being found guilty shall be liable, at the discretion of the Court, to suffer such punishment, by fine or imprisonment for any time not exceeding two years, with or without hard labour, or by both, as the Court shall award, and shall also be liable to an action for damages at the suit of the purchaser or mortgagee, or those claiming under the purchaser or mortgagee, for any loss sustained by them or either or any of them in consequence of the settlement, deed, will, or other instrument or incumbrance so concealed, or of any claim made by any person under such pedigree was concealed by the falsification of such pedigree; and in estimating such damages where the estate shall be recovered from such purchaser or mortgagee, or from those claiming under the purchaser or mortgagee, regard shall be had to any expenditure by them or either or any of them in improvements on the land: but no prosecution for any offence included in this section against any seller or mortgagor, or any solicitor or agent, shall be commenced without the sanction of Her Majesty's Attorney-General, or in case that office be vacant, of Her Majesty's Solicitor-General, and no such sanction shall be given without such previous notice of the application for leave to prosecute to the person intended to be prosecuted as the Attorney-General or Solicitor-General (as the case may be) shall direct.

This section was amended by s. 8 of Lord St. Leonards' Act, 1860 (*m*), which is as follows:—

(*m*) 23 & 24 Vict. c. 38.

[8. The section twenty-four in the Act of the session of the twenty-second and twenty-third of Queen Victoria, chapter thirty-five, shall be read and construed as if the words "or mortgagee" had followed the word "purchaser" in every place where the latter word is introduced in the said section.]

22 & 23  
Vict. c. 35,  
§ 24.  
23 & 24  
Vict. c. 38,  
§ 8.  
Sect. 24 of  
22 & 23  
Vict. c. 35,  
extended  
to mort-  
gagees.

*Semble* that this section does not apply to an incumbrance prior to the stipulated commencement of the abstract, where there is a condition that no earlier title shall be shown. *Per FRY, L.J. (n).*

25. In the construction of the previous provisions in this Act the term "land" shall be taken to include all tenements and hereditaments, and any part or share of or estate or interest in any tenements or hereditaments, of what tenure or kind soever; and

22 & 23  
Vict. c. 35,  
§ 25.  
Interpreta-  
tion of  
terms.

The term "mortgage" shall be taken to include every instrument by virtue whereof land is in any manner conveyed, assigned, pledged, or charged as security for the repayment of money or money's worth lent, and to be reconveyed, reassigned, or released on satisfaction of the debt; and

The term "mortgagor" shall be taken to include every person by whom any such conveyance, assignment, pledge, or charge as aforesaid shall be made; and

The term "mortgagee" shall be taken to include every person to whom or in whose favour any such conveyance, assignment, pledge, or charge as aforesaid is made or transferred;

The term "judgment" shall be taken to include registered decrees, orders of courts of equity and bankruptcy, and other orders having the operation of judgments.

See and compare the interpretation clauses of the principal Statute of Limitation (o), the C. A. 1881 (p), the C. A. 1882 (q), the M. W. P. A. 1882 (r), and the S. L. A. 1882 (s).

(n) *Smith v. Robinson*, 13 Ch. D. 148.

(o) Page 5, *ante*.

(p) Page 210, *post*.

(q) Page 384, *post*.

(r) Page 405, *post*.

(s) Page 472, *post*.

## TRUSTEES AND EXECUTORS.

*Power of Attorney—Revocation.*

22 & 23  
Vict. c. 35,  
§ 26.

Trustee,  
&c.,  
making  
payment  
under  
power of  
attorney  
not to be  
liable by  
reason of  
death of  
party  
giving such  
power.

**26.** No trustee, executor, or administrator making any payment or doing any act *bond fide* under or in pursuance of any power of attorney shall be liable to the money so paid or the act so done, by reason that the person who gave the power of attorney was dead at the time of such payment or act, or had done some act to avoid the power, provided that the fact of the death or of the doing of such act as last aforesaid, at the time of such payment or act *bond fide* done as aforesaid, by such trustee, executor, or administrator was not known to him: Provided always that nothing herein contained shall in any manner affect or prejudice the right of any person entitled to the money against the person to whom such payment shall have been made, but that such person so entitled shall have the same remedy against such person to whom such payment shall be made as he would have had against the trustee, executor, or administrator if the money had not been paid away under such power of attorney.

See s. 47 of the C. A. 1881, and notes thereto (t).

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 LIABILITY OF EXECUTOR FOR RENTS, &c.

22 & 23  
Vict. c. 35,  
§ 27.

As to lia-  
bility of  
executor or  
admini-  
strator in  
respect of  
rents,  
covenants,  
or agree-  
ments.

**27.** Where an executor or administrator, liable as such to the rents, covenants, or agreements contained in any lease or agreement for a lease granted or assigned to the testator or intestate whose estate is being administered, shall have satisfied all such liabilities under the said lease or agreement for a lease as may have accrued due and been claimed up to the time of the assignment hereafter mentioned, and shall have set apart a sufficient fund to answer any future claim that

(t) Page 303, *post*.

may be made in respect of any fixed and ascertained sum covenanted or agreed by the lessee to be laid out on the property demised or agreed to be demised, although the period for laying out the same may not have arrived, and shall have assigned the lease or agreement for a lease to a purchaser thereof, he shall be at liberty to distribute the residuary personal estate of the deceased to and amongst the parties entitled thereto respectively, without appropriating any part, or any further part (as the case may be), of the personal estate of the deceased to meet any future liability under the said lease or agreement for a lease; and the executor or administrator so distributing the residuary estate shall not, after having assigned the said lease or agreement for a lease, and having, where necessary, set apart such sufficient fund as aforesaid, be personally liable in respect of any subsequent claim under the said lease or agreement for a lease; but nothing herein contained shall prejudice the right of the lessor or those claiming under him to follow the assets of the deceased into the hands of the person or persons to or amongst whom the said assets may have been distributed.

22 & 23  
Vict. c. 35,  
**§ 27.**

This section is retrospective (u).

In an early case it was considered that an indemnity fund was set apart rather for the security of the landlord than the indemnity of the executor, and LORD ROMILLY, M.R., refused to distribute such a fund among the beneficiaries without the consent of the landlord (x). But in a subsequent case, KINDERSLEY, V.-C., held that a landlord had no equity to have a fund set apart (y), and ordered payment out of a fund which had been set aside as an indemnity (z).

Retrospec-  
tive.  
Indemnity  
fund dis-  
tributed.

Although an executor who in an administration action states all the facts fairly is amply protected by the judgment of the Court and requires no other indemnity (a), it was at one time considered that they were entitled to an inquiry whether there was any subsisting liability in respect of past breaches of covenant (b). It appears that where the usual advertisements have been issued, and no claim has been made in respect of any

Protection  
of executor  
under  
order of  
Court.

(u) *Smith v. Smith*, 1 Dr. & S. 384;  
*Dodson v. Sammell*, 9 W. R. 887;  
*Bennett v. Lytton*, 2 J. & H. 155.

(x) *Bunting v. Marriott*, 5 Jur. N. S. 965; 9 W. R. 264.

(y) *Dodson v. Sammell*, 9 W. R. 887.

(z) *Ibid.*; *Reilly v. Reilly*, 34 B. 406.

(a) *Smith v. Smith*, 9 W. R. 406;  
*England v. Lord Tredegar*, L. R. 1 Eq.

345; *Bennett v. Lytton*, 2 J. & H. 155.

(b) *Hughes v. Young*, 4 N. R. 17;  
compare *Re Forrest*, W. N. (1868) 194.

22 & 23  
Vict. c. 35,  
**§ 27.** such breach, this is not necessary, and the Court will distribute the whole of the testator's estate without regard to any possible claim (c).  
And executors who are administering an estate out of court, and have inserted proper advertisements under s. 29 of this Act, may safely act in the same way (d).

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#### EXECUTOR'S LIABILITY TO RENTSCHARGE.

22 & 23  
Vict. c. 35,  
**§ 28.** **28.** In like manner, where an executor or administrator liable as such to the rent, covenants, or agreements contained in any conveyance on chief rent or rentcharge (whether any such rent be by limitation of use, grant, or reservation), or agreement for such conveyance, granted or assigned to or made and entered into with the testator or intestate whose estate is being administered, shall have satisfied all such liabilities under the said conveyance, or agreement for a conveyance, as may have accrued due and been claimed up to the time of the conveyance hereafter mentioned, and shall have set apart a sufficient fund to answer any future claim that may be made in respect of any fixed and ascertained sum covenanted or agreed by the grantee to be laid out on the property conveyed, or agreed to be conveyed, although the period for laying out the same may not have arrived, and shall have conveyed such property, or assigned the said agreement for such conveyance as aforesaid, to a purchaser thereof, he shall be at liberty to distribute the residuary personal estate of the deceased to and amongst the parties entitled thereto respectively, without appropriating any part or any further part (as the case may be) of the personal estate of the deceased to meet any future liability under the said conveyance or agreement for a conveyance; and the executor or administrator so distributing the residuary estate shall not, after having made or executed such conveyance or assignment, and having, where necessary, set apart such sufficient fund as aforesaid, be personally liable in respect of any subsequent claim under the said conveyance, or agreement for conveyance; but nothing

As to liability of executor, &c., in respect of rents, &c., in conveyances on rentcharge.

(c) *Ross v. Tatham*, 17 W. R. 960.

(d) *Re Green*, 2 D. F. J. 121.

herein contained shall prejudice the right of the grantor, or those claiming under him, to follow the assets of the deceased into the hands of the person or persons to or among whom the said assets may have been distributed.

22 & 23  
Vict. c. 35,  
§ 28.

## NOTICES TO CLAIMANTS BY EXECUTORS, &amp;C.

**29.** Where an executor or administrator shall have given such or the like notices<sup>1</sup> as in the opinion of the Court in which such executor or administrator is sought to be charged would have been given by the Court of Chancery in an administration suit,<sup>4</sup> for creditors and others<sup>2</sup> to send in to the executor or administrator their claims against the estate of the testator or intestate, such executor or administrator shall, at the expiration of the time named in the said notices or the last of the said notices for sending in such claims, be at liberty to distribute the assets of the testator or intestate, or any part thereof, amongst the parties entitled thereto, having regard to the claims of which such executor or administrator has then notice, and shall not be liable for the assets or any part thereof so distributed to any person of whose claim such executor or administrator shall not have had notice<sup>3</sup> at the time of distribution of the said assets or a part thereof, as the case may be; but nothing in the present Act contained shall prejudice the right of any creditor or claimant to follow the assets or any part thereof into the hands of the person or persons who may have received the same respectively.<sup>5</sup>

22 & 23  
Vict. c. 35,  
§ 29.

As to distribution of the assets of testator or intestate after notice given by executor or administrator.

<sup>1</sup> "By these advertisements and by these proceedings under the Act, an executor is entitled to have, and in point of fact has, all the protection which he would have had under the old rule of the Court, if the assets had been administered by such executor under the decree of the Court." *Per MALINS, V.-C. (e).*

Effect of proper notices.

<sup>2</sup> And notices by an administrator to "creditors and other persons having claims or demands against or upon the estate," will protect him

(e) *Clegg v. Rowland*, L. R. 3 Eq. 368.

22 & 23  
Vict. c. 35,  
**§ 29.**

What  
notices  
sufficient.

Informa-  
tion must  
be given to  
excluded  
claimant.

against claims not only of creditors, but of next of kin who do not send in their claims till after the time limited by the notice (*f*).

<sup>3</sup> But such notices will not protect him against claims of which he has actual or constructive notice, *e.g.*, liability for unpaid calls on shares held by the testator or intestate in a joint stock company (*g*).

<sup>4</sup> The Court always requires notices in the *Gazette* and often in the *Times*. Notices in local newspapers only are therefore insufficient (*h*). And if there is any reasonable ground for thinking that any claimants are abroad, notices should be advertised there (*i*).

<sup>5</sup> An executor or administrator who has distributed the assets must give any unpaid creditor who may apply to him full information as to the persons among whom they have been distributed. A copy of the residuary account has been held sufficient information (*k*).

Where proper notices have been advertised under this section, there is no necessity to re-advertise after a subsequent judgment for administration (*l*).

#### PETITIONS FOR JUDICIAL ADVICE.

22 & 23  
Vict. c. 35,  
**§ 30.**

Trustee,  
executor,  
&c., may  
apply by  
petition to  
judge of  
Chancery  
for  
opinion,  
advice, &c.,  
in manage-  
ment, &c.,  
of trust  
property.

**30.** Any trustee, executor, or administrator shall be at liberty, without the institution of a suit, to apply by petition to any judge of the High Court of Chancery,<sup>1</sup> or by summons upon a written statement to any such judge at chambers, for the opinion, advice, or direction of such judge on any question respecting the management<sup>2</sup> or administration<sup>3</sup> of the trust property or the assets of any testator or intestate, such application<sup>4</sup> to be served upon or the hearing thereof to be attended by all persons interested in such application, or such of them as the said judge shall think expedient; and the trustee, executor, or administrator acting upon the opinion, advice, or direction given by the said judge shall be deemed, so far as regards his own responsibility, to have discharged his duty as such trustee, executor, or administrator in the subject-matter of the said application; provided nevertheless, that this Act

(*f*) *Newton v. Sherry*, 1 C. P. D. 247.

(*g*) *Russell's case*, 15 Sol. J. 790; *Markwell's case*, 21 W. R. 135.

(*h*) *Wood v. Weightman*, L. R. 13 Eq. 434.

(*i*) *Newton v. Sherry*, 1 C. P. D. 246—256.

(*k*) *Re Lindsay, Filgate v. Lindsay*, Ir. R. 8 Eq. 61.

(*l*) *Cuthbert v. Wharmley*, W. N. (1869) 12.



shall not extend to indemnify any trustee, executor, or administrator in respect of any act done in accordance with such opinion, advice, or direction as aforesaid, if such trustee, executor, or administrator shall have been guilty of any fraud or wilful concealment or misrepresentation in obtaining such opinion, advice, or direction; and the costs of such application as aforesaid shall be in the discretion of the judge to whom the said application shall be made.

22 & 23  
Vict. c. 35,  
**§ 30.**

With regard to applications under this section, sect. 9 of Lord St. Leonards' Act, 1860 (*m*), provides as follows:—

[9. Where any trustee, executor, or administrator shall apply for the opinion, advice, or direction of a judge of the Court of Chancery under the thirtieth section of the Act of the twenty-second and twenty-third of Her present Majesty, chapter thirty-five, the petition or statement shall be signed by counsel, and the judge by whom it is to be answered may require the petitioner or applicant to attend him by counsel either in chambers or in Court where he deems it necessary to have the assistance of counsel.]

23 & 24  
Vict. c. 38,  
**§ 9.**

Form of  
applying  
for ad-  
vice of  
judge.

<sup>1</sup> Now the Chancery Division of the High Court of Justice in England (*n*) or Ireland (*o*).

<sup>2</sup> The object of this enactment is to enable trustees to protect themselves by obtaining the opinion of the Court when they are in doubt as to their powers or duties with regard to the management of trust property (*p*). The Court has accordingly given its advice or opinion on the following questions:—Whether trustees should retain certain mining and bank shares of which their testator died possessed (*q*); whether trustees were justified in retaining shares in a joint stock bank for a limited time in order to secure the benefit of a new issue to existing shareholders (*r*); whether trustees might, under special circumstances, retain an insufficient security in which their testator had invested (*s*); whether wasting securities ought to be converted under the rule in *Howe v. Dartmouth* (*t*) or enjoyed *in specie* (*u*); whether a change of investment might be made without the consent of a bankrupt divorced

Questions  
of manage-  
ment  
decided.

(*m*) 23 & 24 Vict. c. 38.

(*n*) 36 & 37 Vict. c. 66, ss. 16 and 34.

(*o*) 40 & 41 Vict. c. 57, ss. 21 and 36.

(*p*) *Re Hooper*, 9 W. R. 729.

(*q*) *Re Tuck*, W. N. (1869) 15.

(*r*) *Re Hirst*, 13 W. R. 225.

(*s*) *Re Fanning*, 10 Jur. N. S. 307.

(*t*) 7 Ves. 137.

(*u*) *Re Shaw*, L. R. 12 Eq. 124; *Re Elmore*, 9 W. R. 66.



22 & 23  
 Vict. c. 35,  
§ 30.

husband who had married again (*x*); whether, shortly after the American Civil War, trustees might safely exercise an absolute discretion given to them to change investments from English to American securities (*y*); whether a power to invest in the "bonds, debentures, or other securities, or the stocks or funds of any colony or foreign country," authorised investments in the guaranteed bonds of a French railway company (*z*); whether a power to invest in real estate in England and Wales authorised a mortgage on Scotch real estate (*a*); whether a power to invest in the purchase of lands or hereditaments in fee simple in possession; authorised the purchase of freehold ground-rents (*b*); whether trustees were authorised to lease real estate (*c*); whether a direction to trustees to mortgage authorised a mortgage with a power of sale (*d*); whether executors might distribute a testatrix's estate under s. 27 of this Act, without setting aside any fund to provide against liability under covenants in a lease (*e*); whether trust funds might be applied in payment of the costs of proceedings taken by the tenant for life for the protection of a settled estate (*f*); whether a ruinous house might be rebuilt, pursuant to a direction to invest in the purchase of land to go along with certain settled property (*g*); whether personalty settled upon the same trusts, as real estate might (in the absence of a power in that behalf) be applied in rebuilding an uninhabitable house on the real estate, so as to make it a desirable residence for the tenant for life and his family (*h*); whether trustees ought, on behalf of infant remaindermen, to make a compromise with a tenant for life with respect to delapidations (*i*); whether trustees ought to enter into a compromise of a claim under a mortgage of a plantation in Jamaica, where they had no means of verifying certain accounts (*k*); whether trustees might, under a power of advancement for the benefit of children, pay their passage-money to New Zealand when their health necessitated removal to a warmer climate, and whether new trustees resident in New Zealand might be appointed (*l*); whether a power to apply part of a fund for the advancement or benefit of a married woman authorised an advance to her husband to enable him to renew a partnership (*m*).

But the Court will not express its opinion upon a hypothetical case, even though the exact case is expected shortly to arise (*n*).

<sup>3</sup> The question whether the Court will, under this section, decide

- (*x*) *Re Ward*, 14 W. R. 96.
- (*y*) *Re Knowles*, 37 L. J. Ch. 840.
- (*z*) *Re Langdale*, L. R. 10 Eq. 39.
- (*a*) *Re Miles*, 27 B. 579. Compare  
*Re Simson*, 1 J. & H. 89.
- (*b*) *Re Peyson*, L. R. 7 Eq. 463.
- (*c*) *Re Shaw*, L. R. 12 Eq. 124.
- (*d*) *Re Chawner*, L. R. 8 Eq. 569.
- (*e*) *Re Green*, 2 D. F. J. 121.

- (*f*) *Re De la Warr*, 16 Ch. D. 587.
- (*g*) *Re Hotham*, L. R. 12 Eq. 76.
- (*h*) *Re Pearson*, 21 W. R. 401.
- (*i*) *Re Cross*, 10 L. T. N. S. 405.
- (*k*) *Re Mackintosh*, 42 L. J. Ch. 208.
- (*l*) *Re Long*, 17 W. R. 218.
- (*m*) *Re Kershaw*, L. R. 6 Eq. 322.
- (*n*) *Re Box*, 11 W. R. 945.

points of construction affecting the rights of parties has given rise to some conflict of decision. As there is no appeal from the order giving the opinion or advice of the Court, a question upon which there are conflicting decisions precisely in point should not be raised under this section, and will not be decided unless all parties are *sui juris*, and consent (o). Accordingly the Court refused to decide whether, on the true construction of an intestate's marriage settlement, there was an implied covenant which rendered his personal estate liable (p). And it has been laid down that, even where all parties interested consent, the Court ought not to decide questions of construction affecting property of great value under this section, there being no appeal from the decision (q).

22 & 23  
Vict. c. 35,  
§ 30.

Refusal to  
decide  
difficult  
questions  
of con-  
struction.

In an early case it was considered that the opinion of the Court on questions of construction could not be obtained at all under this section, and that when such opinion was desired, the money should be paid into Court under the Trustee Relief Act (r). In one case (s) KINDERSLEY, V.-C., declined to express an opinion whether a trustee was entitled to exercise his discretion by refusing to comply with a request to advance trust funds to a husband.

And a question whether trustees with a power to purchase land were justified in laying out money in repairs and permanent improvements was not answered, on the ground that affidavits would be necessary to enable the Court to form an opinion, and that it was not the practice to file affidavits on petitions under this section (t). It may be observed that the last two cases seem inconsistent with *Re Long*, *Re Kershaw*, *Re Hotham*, and *Re Pearson*, cited above; and they would probably not, now, be followed. And notwithstanding the views expressed in the earlier cases, the Court has on several occasions expressed opinions under this section which involved decisions as to the rights of parties. For instance, questions have been answered as to the construction of a gift to next of kin, and the period when the class composing the next of kin was to be ascertained (u); whether shares of residue were payable at the age of twenty-one or of thirty (x); whether legacies to infants domiciled abroad were payable at the age fixed by English or by foreign law as the age of majority (y); as to the construction of a gift over an insolvency (z); whether a legacy to a Jewish charity was valid (a); and whether a person who, having a husband living, had gone through the form of marriage with a testator under the description of a widow, was entitled to

Simple  
questions  
of con-  
struction  
decided.

- (o) *Re Mockett*, Joh. 628.
- (p) *Re Evans*, 30 B. 232.
- (q) *Re Bunnell*, 10 Jur. N. S. 1098.
- (r) *Re Hooper*, 9 W. R. 729.
- (s) *Re Lorenz*, 9 W. R. 567.
- (t) *Re Barrington*, 1 J. & H. 142.

- (u) *Re Lang*, 9 W. R. 589.
- (x) *Re Jacob*, 29 B. 403.
- (y) *Re Hellmann*, L. R. 2 Eq. 363.
- (z) *Re Muggeridge*, Joh. 625.
- (a) *Re Michel*, 28 B. 39.

22 & 23  
Vict. c. 35,  
**§ 30.**

legacies bequeathed by him to his wife (b). The Court has also by consent, decided under this section a question between the Crown and a subject as to stamp duty (c).

Where a question arose whether trustees ought to pay income, to which a married woman of unsound mind, not so found, was entitled for her separate use, to her husband on his undertaking to apply it for the maintenance of his wife and children, KINDERSLEY, V.-C., desired that the petition should be mentioned to the Lords Justices, who heard it and authorised such payment (d). But in a subsequent similar case, MALINS, V.-C., himself heard the petition, and expressed an opinion in favour of the proposed payment (e).

Questions  
of con-  
struction  
can now  
be raised  
under R.  
S. C. 1883,  
Order LV.

In future it will probably be held that questions of construction and questions affecting the rights of parties, as distinguished from questions as to the management of trust property, ought to be raised by originating summons under the R. S. C. 1883 (f). Questions as to the exercise of the discretion of trustees, if raised by the trustees, may be brought before the Court by petition under this section (or perhaps by originating summons under Order LV., r. 3 (g)), and if raised by a *cestui que trust*, by originating summons under Order LV., r. 3 (e). It has been held that a petition for opinion or advice under Lord St. Leonards' Act may be presented by a *cestui que trust* (g); but having regard to the facilities afforded by Order LV., the Court would probably decline to follow this precedent.

Practice  
under s.  
30 of  
Lord St.  
Leonards'  
Act.  
R. S. C.  
1883,  
Ord. LII.  
r. 19.

<sup>4</sup> The practice relating to petitions under s. 30 of Lord St. Leonards' Act is now governed by R. S. C. 1883, Order LII., rr. 19—22, which are as follows:—

R. S. C.  
1883,  
Ord. LII.  
r. 20.

[19. All petitions, summonses<sup>6</sup>, statements, affidavits<sup>6</sup>, and other written proceedings for the opinion, advice, or direction of a judge under the 30th section of the Act 22 & 23 Vict. c. 35, shall be intituled in the matter of that Act, and in the matter of the particular trust, will, or administration, and every such petition or statement shall state the facts concisely, and shall be divided into paragraphs numbered consecutively.]

R. S. C.  
1883,  
Ord. LII.  
r. 21.

[20. At the time when any such summons as in the last preceding rule mentioned is sealed, the statement upon which the same is grounded shall be left at the chambers of the judge to whom the same is assigned, and shall, on the conclusion of the proceedings, be transmitted to the Chancery Registrar by the chief clerk, with the minutes of the opinion, advice or direction given by the judge, and the registrar shall cause such statement to be transmitted to the central office, to be there filed.]

[21. Every such petition or summons as in Rule 19 mentioned, shall be served<sup>7</sup> seven clear days before the hearing thereof, unless the person served shall consent to a shorter time.]

(b) *Re Petts*, 27 B. 576.

(c) *Re Ware*, 20 W. R. 142.

(d) *Re Spiller*, 6 Jur. N. S. 386.

(e) *Re T.*, 15 Ch. D. 78.

(f) Order LV., r. 3.

(g) *Re Ward*, 14 W. R. 96.

[22. The opinion, advice, or direction of the judge, as in Rule 19, mentioned, shall be passed, and entered and remain as of record in the same manner as any order made by the Court or a judge, and the same shall be termed a "judicial opinion," or "judicial advice," or "judicial direction," as the case may be.]

22 & 23  
Vict. c. 35,  
§ 30.

R. S. C.  
1883,  
Ord. LII.  
r. 22.

<sup>6</sup> In an early case it was said that the application ought to be by petition and not by summons in chambers (*h*).

<sup>6</sup> Although the above rules (which are founded on the Chancery Orders of 20th March, 1860) mention affidavits, it has been held that affidavits ought not to be used. The Court relies on the statement of the trustees, and unless they fairly state all material facts they will not be protected (*i*).

Affidavits.

The petition or summons ought not to be served unless the judge, on application in chambers, directs service (*k*); and it appears that where the question raised is one merely affecting the management of the trust property, *e.g.*, as to the change or retention of a testator's investments (*l*), service on the beneficiaries will generally not be required (*m*). The Court will not, on a petition under this section, direct an inquiry in chambers (*n*). Where the domicil of the testator and one trustee was Irish, and the domicil of the tenant for life and the only other trustee was English, the English Court heard a petition by the two trustees as to their power of investment, there having been no similar application to any Irish Court (*o*).

Inquiry  
not  
directed.  
Jurisdic-  
tion.

Irish tes-  
tator.

## INDEMNITY OF TRUSTEES.

**31.** Every deed, will, or other instrument creating a trust either expressly or by implication shall, without prejudice to the clauses actually contained therein, be deemed to contain a clause in the words or to the effect following; that is to say, "that the trustees or trustee for the time being of the said deed, will, or other instrument, shall be respectively chargeable only for such monies, stocks, funds, and securities as they shall respectively actually receive, notwithstanding their respectively signing any receipt for the sake of conformity, and shall be answerable and accountable only for their own acts, receipts, neglects, or defaults, and not for those of each other,

22 & 23  
Vict. c. 35,  
§ 31.

Every  
trust in-  
strument  
to be  
deemed  
to contain  
clauses for  
the indem-  
nity and  
reimburse-  
ment of  
the  
trustees.

(*h*) *Re Dennis*, 5 Jur. N. S. 1388.

(*i*) *Re Muggeridge*, Joh. 625; *Re Barrington*, 1 J. & H. 142.

(*k*) *Re Muggeridge*, Joh. 625.

(*l*) *Re Tuck*, W. N. (1869) 15.

(*m*) *Re French*, L. R. 15 Eq. 68.

(*n*) *Re Mockett*, Joh. 628.

(*o*) *Re French*, L. R. 15 Eq. 68.

22 & 23  
Vict. c. 35,  
§ 31.

nor for any banker, broker, or other person with whom any trust monies or securities may be deposited, nor for the insufficiency or deficiency of any stocks, funds, or securities, nor for any other loss, unless the same shall happen through their own wilful default respectively; and also that it shall be lawful for the trustees or trustee for the time being of the said deed, will, or other instrument to reimburse themselves or himself, or pay or discharge out of the trust premises, all expenses incurred in or about the execution of the trusts or powers of the said deed, will, or other instrument.

See s. 36 of the C. A., 1881, and notes thereto, p. 287, *post*.

#### INVESTMENTS BY TRUSTEES.

22 & 23  
Vict. c. 35,  
§ 32.

As to  
invest-  
ments by  
trustees.

**32.** When a trustee, executor, or administrator, shall not, by some instruments creating his trust, be expressly forbidden to invest any trust fund on real securities, in any part of the United Kingdom, or on the stock of the Bank of England or Ireland, or on East India Stock<sup>1</sup>, it shall be lawful for such trustee, executor, or administrator to invest such trust fund on such securities or stock; and he shall not be liable on that account as for a breach of trust, provided that such investment shall in other respects be reasonable and proper.

This section was made retrospective by s. 12 of Lord St. Leonards' Act, 1860, which is as follows:—

23 & 24  
Vict. c. 38,  
§ 12.

[12. Clause thirty-two of the said Act of the twenty-second and twenty-third of Queen Victoria, chapter thirty-five shall operate retrospectively.]

Clause 32  
of 22 & 23  
Vict. c. 35,  
to act  
retrospec-  
tively.

In order to remove doubts which arose as to the meaning of the words "East India Stock," the Act 30 & 31 Vict. c. 132, was passed. It consists of two sections only, which are as follows:—

- [1. The words "East India Stock," in the said Act, passed in the session holden in the twenty-second and twenty-third years of Her Majesty, chapter thirty-five, shall include and express as well the East India Stock which existed previously to the thirteenth day of August, one thousand eight hundred and fifty-nine, when the said Act received the assent of Her Majesty, as East India Stock charged on the revenues of India, and created under and by virtue of any Act or Acts of Parliament which received Her Majesty's assent on or after the thirteenth day of August, one thousand eight hundred and fifty-nine; and it shall be lawful for every trustee, executor, or administrator to invest any trust fund in his possession or under his control in the stock created by the last-mentioned Act or Acts to the same extent and for the same purposes and objects as he can now invest such trust fund in the East India Stock which existed previously to the thirteenth day of August, one thousand eight hundred and fifty-nine.]
- [2. It shall be lawful for every trustee, executor, or administrator to invest any trust fund in his possession or under his control in any securities, the interest of which is or shall be guaranteed by Parliament to the same extent and in the same manner as he may invest such trust fund in such securities as aforesaid.]

22 & 23  
Vict. c. 35,  
**§ 32.**  
30 & 31  
Vict. c.  
132,  
**§ 1.**

East India  
Stock as  
used in  
s. 32  
of Lord St.  
Leonards'  
Act, 1859,  
defined.

30 & 31  
Vict. c.  
132,  
**§ 2.**

Trustees  
may invest  
in any  
securities  
with  
interest  
guaranteed  
by Parlia-  
ment.

As to cases in which the Court will authorise a change from other investments to East India Stock, see the cases cited below (p).

It has recently been held that, under this section and ss. 10 and 11 of Lord St. Leonards' Act, 1360 (which authorise general orders as to the investment of cash under the control of the Court, and provide that trustees may invest in such securities), trustees having power to invest in Government or Parliamentary securities, "and none other than Parliamentary and Government securities," may invest in any securities

(p) *Mortimer v. Picton*, 10 Jur. N. S. 83; *Vidler v. Parrott*, 12 W. R. 976; *Re Warde*, 2 J. & H. 191; *Re Colne*

*Valley Bill*, 1 D. F. J. 53, 8 W. R. 18; *Re Fromow*, 8 W. R. 272.

22 & 23 in which cash under the control of the Court may be invested (*q*). As to  
 Vict. c. 35, what investments such securities include, see Lewin, 7th ed. 283, Godefroi,  
**§ 32.** 133, *et seq.*  
 30 & 31

Vict. c.  
 132,  
**§ 2.**

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#### EXTENT OF ACT.

22 & 23  
 Vict. c. 35,  
**§ 33.**

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**33.** This Act shall not extend to Scotland.

(*q*) *Re Wedderburn*, 9 Ch. D. 112.

Act not to  
 extend to  
 Scotland.

## THE VENDOR AND PURCHASER ACT, 1874.

*An Act to amend the Law of Vendor and Purchaser, and  
further to simplify Title to Land.*

WHEREAS, it is expedient to facilitate the transfer of land by means of certain amendments in the law of vendor and purchaser: 37 & 38  
Vict. c. 78.  
Preamble.

Be it enacted, &c.

### ROOT OF TITLE—FORTY YEARS.

1. In the completion of any contract of sale<sup>1</sup> of land<sup>2</sup> made after the thirty-first day of December, one thousand eight hundred and seventy-four, and subject to any stipulation to the contrary in the contract,<sup>3</sup> forty years shall be substituted as the period of commencement of title which a purchaser may require in place of sixty years, the present period of such commencement;<sup>4</sup> nevertheless, earlier title than forty years may be required in cases similar to those in which earlier title than sixty years may now be required.<sup>5</sup> 37 & 38  
Vict. c. 78,  
§ 1.  
Forty  
years sub-  
stituted for  
sixty years  
as root of  
title.

<sup>1</sup> The Act, in terms, applies only to a sale, and not to a mortgage. The rights of a mortgagee are, therefore, unaffected by this section, and the rules under s. 2. Contract  
for sale.

<sup>2</sup> Nor does the Act appear to apply to incorporeal hereditaments. The definition of the word "land" in s. 1 of the principal Statute of Limitation (u), may be usefully referred to. The Vendor and Purchaser Act contains no definition. On the other hand, the word "land" in the Conveyancing Act, 1881 (x), is, by the interpretation clause (y) of that Act, expressly extended so as to include incorporeal hereditaments. It is to be regretted that the definition in the last-mentioned Act is not Meaning  
of "land."

(u) 3 & 4 Will. 4, c. 27, p. 5, *ante*.  
(x) 44 & 45 Vict. c. 41.

(y) Sect. 2.



37 & 38  
 Vict. c. 78,  
 § 1. thereby made applicable to the Vendor and Purchaser Act, instead of leaving the meaning of the word "land" in the latter to be governed by s. 4 of the Act for shortening the language used in Acts of Parliament (z), which, so far as material, is as follows:—

[4. That in all Acts the word "land" shall include messuages, tenements, and hereditaments, houses, and buildings, of any tenure, unless where there are words to exclude houses and buildings, or to restrict the meaning to tenements of some particular tenure.]

The definition in Lord St. Leonards' Act, 1859 (a), is as follows:—

[25. In the construction of the previous provisions in this Act the term "land" shall be taken to include all tenements and hereditaments, and any part or share of or estate or interest in any tenements or hereditaments, of what tenure or kind soever.]

<sup>3</sup> In many cases, circumstances exist which render a stipulation that the title shall commence with a document less than forty years old, not only advisable, but necessary. In practice an abstract is often limited to twenty or thirty years, and this is constantly accepted as a fair holding title.

Reason  
 for length  
 of abstract.

<sup>4</sup> Eminent authorities have differed as to whether the time for which a title is required to be shown depends upon the time which confers a title under the Statutes of Limitation, or upon the average duration of human life. See note 2 to s. 5 of the Real Property Limitation Act, 1874 (b). Where an abstract shows a good equitable title in the vendor, with power to get in the legal estate under the Trustee Acts or otherwise, it is unnecessary to trace the devolution of the legal estate (c).

When  
 longer  
 than forty  
 years' title  
 may be  
 required.

<sup>5</sup> The title to an advowson must be carried back for 100 years (d), or for sixty years with three presentations (e).

"Upon the sale of a reversionary interest, whatever may be its antiquity, the abstract should go back sufficiently far to show its creation" (f).

Upon a sale of leaseholds the vendor must produce the original lease, or account for its absence and prove its contents, although it may be

(z) 13 & 14 Vict. c. 21.

(a) 22 & 23 Vict. c. 35.

(b) 37 & 38 Vict. c. 57, p. 171, *ante*.

(c) *Camberwell and South London Building Society v. Holloway*, 13 Ch. D. 754.

(d) Dart, V. & P. (5th ed.), 293.

(e) 1 Dav. (4th ed.), 527. See also 3 & 4 Will. 4, c. 27, s. 30, p. 73, *ante*.

(f) Dart, V. & P. (5th ed.), 294.

more than sixty [or now forty] years old (g). But this rule does not apply where the vendor only professes to sell an underlease, and this clearly appears in the contract or particular and conditions (h). 37 & 38  
Vict. c. 78,  
§ 1.

A similar rule applies to property held under a grant from the crown (i). With regard to tithes and other incorporeal hereditaments, a question may arise whether, in addition to the production of the original grant, the title must be regularly deduced for forty or sixty years prior to the day of sale.

Upon ordinary sales of land the prior title must, in some cases, be produced to explain matters arising upon the abstract. "In every case where the statement in the abstract, or its silence, leads to a fair inference that the prior title may disclose an existing defect, the purchaser may require it to be produced" (k).

And where a vendor accidentally discloses a defect in his prior title, the purchaser is entitled to an inquiry whether a good holding title can be made, notwithstanding a stipulation that the prior title should not be required or inquired into (l). The non-disclosure of material deeds is made a criminal offence by s. 24 of Lord St. Leonards' Act, 1859 (m), which is as follows:—

[24. Any seller or mortgagor of land (n), or of any chattels, real or personal, or choses in action conveyed or assigned to a purchaser, or the solicitor or agent of any such seller or mortgagor, who shall after the passing of this Act conceal any settlement, deed, will, or other instrument, material to the title or any incumbrance from the purchaser, or falsify any pedigree upon which the title does or may depend, in order to induce him to accept the title offered or produced to him, with intent in any of such cases to defraud, shall be guilty of a misdemeanour, and being found guilty shall be liable, at the discretion of the Court, to suffer such punishment, by fine or imprisonment, for any time not exceeding two years, with or without hard labour, or by both, as the Court shall award, and shall also be liable to an action for damages at the suit of the purchaser or mortgagee, or those claiming under the

22 & 23  
Vict. c. 35,  
§ 24.  
Punish-  
ment of  
vendor,  
&c., for  
fraudulent  
conceal-  
ment of  
deeds, &c.,  
or falsify-  
ing pedi-  
gree.

(g) *Frend v. Buckley*, L. R. 5 Q. B. 213, 217, 218.

(h) *Camdenwell and South London Benefit Building Society v. Holloway*, 13 Ch. D. 754.

(i) *Dart*, V. & P. (5th ed.), 295.

(k) *Sugd., V. & P.* (14th ed.), 366.

(l) *Smith v. Robinson*, 13 Ch. D. 148.

(m) 22 & 23 Vict. c. 35.

(n) For the meaning of "land" in this Act, see s. 25, p. 171, *ante*.

37 & 38  
Vict. c. 78,  
§ 1.  
22 & 23  
Vict. c. 35,  
§ 24.

purchaser or mortgagee, for any loss sustained by them or either or any of them in consequence of the settlement, deed, will, or other instruments or incumbrance so concealed, or of any claim made by any person under such pedigree, but whose right was concealed by the falsification of such pedigree; and in estimating such damages, where the estate shall be recovered from such purchaser or mortgagee, or from those claiming under the purchaser or mortgagee, regard shall be had to any expenditure by them, or either or any of them, in improvements on the land; but no prosecution for any offence included in this section against any seller or mortgagor, or any solicitor or agent, shall be commenced without the sanction of Her Majesty's Attorney-General, or in case that office be vacant, of Her Majesty's Solicitor-General; and no such sanction shall be given without such previous notice of the application for leave to prosecute to the person intended to be prosecuted, as the Attorney-General or the Solicitor-General (as the case may be) shall direct.]

And by s. 8 of Lord St. Leonards' Act, 1860 (o), it is provided that—

23 & 24  
Vict. c. 38,  
§ 8.

Sect. 24 of  
22 & 23  
Vict. c. 35,  
extended  
to mort-  
gagees.

[8. The section twenty-four in the Act of the session of the twenty-second and twenty-third of Queen Victoria, chapter thirty-five, shall be read and construed as if the words "or mortgagee" had followed the word "purchaser" in every place where the latter word is introduced in the said section.]

But *semble* that these provisions do not apply to an incumbrance prior in date to the prescribed or stipulated commencement (p).

#### RIGHTS UNDER OPEN CONTRACT.

37 & 38  
Vict. c. 78,  
§ 2.

Rights  
under open  
contract.

2. In the completion of any such contract as aforesaid,<sup>1</sup> and subject to any stipulation to the contrary in the contract,<sup>2</sup> the obligations and rights of vendor and purchaser shall be regulated by the following rules; that is to say,

(o) 23 & 24 Vict. c. 38.

(p) *Smith v. Robinson*, 13 Ch. D. 148.

- First. Under a contract to grant or assign a term of years,<sup>3</sup> whether derived or to be derived out of a freehold or leasehold estate, the intended lessee or assign shall not be entitled<sup>4</sup> to call for<sup>5</sup> the title to the freehold.<sup>6</sup> 37 & 38  
Vict. c. 78,  
§ 2.  
Rule I.  
Lessor's  
title.
- Second. Recitals, statements, and descriptions of facts, matters, and parties contained in deeds, instruments, Acts of Parliament,<sup>11</sup> or statutory declarations, twenty years old at the date of the contract, shall, unless and except so far as they shall be proved to be inaccurate,<sup>8</sup> be taken to be sufficient<sup>9</sup> evidence of the truth of such facts, matters, and descriptions. Rule II.  
Recitals  
evidence.
- Third. The inability of the vendor to furnish the purchaser with a legal covenant to produce and furnish copies of documents of title shall not be an objection to title in case the purchaser will, on the completion of the contract, have an equitable right to the production of such documents.<sup>12</sup> Rule III.  
Covenants  
for produc-  
tion.
- Fourth. Such covenants for production as the purchaser can and shall require shall be furnished at his expense;<sup>13</sup> and the vendor shall bear the expense of perusal and execution on behalf of and by himself, and on behalf of and by necessary parties other than the purchaser. Rule IV.  
Expense of  
covenants  
for produc-  
tion.
- Fifth. Where the vendor retains any part of an estate to which any documents of title relate he shall be entitled to retain such documents.<sup>15</sup> Rule V.  
Title  
deeds.

<sup>1</sup> The five rules contained in s. 2 of the V. and P. Act, 1874, apply to all contracts of sale of land made after the 31st December, 1874 (*q*). Every sale and contract to grant a lease made after the 31st of December, 1883, is also governed by such of the additional provisions as are applicable thereto, contained in ss. 3 and 13 of the C. A., 1881 (*r*), and s. 4 of the C. A., 1882 (*s*), except so far as such provisions are excluded and varied by the contract. The last mentioned sections are as follows:—

(*q*) Sect. 1, p. 185, *ante*.  
(*r*) 44 & 45 Vict. c. 41.

(*s*) 45 & 46 Vict. c. 39.

37 & 38  
Vict. c. 78,

§ 2.

44 & 45  
Vict. c. 41,

§ 3.

Applica-  
tion of  
stated con-  
ditions of  
sale to all  
contracts.

Rule I.  
Lessor's  
title on sale  
of under-  
lease.

Rule II.  
Lord's  
title on sale  
of enfran-  
chised  
copyhold.

Rule III.  
Production  
of title  
prior to  
commence-  
ment of  
abstract.

Rule IV.  
Receipt for  
rent *prima*  
*facie* evi-  
dence of  
perform-  
ance of  
lessee's  
covenants,  
&c.

[3. (1.) Under a contract to sell and assign a term of years derived out of a leasehold interest in land, the intended assign shall not have the right to call for the title to the leasehold reversion.<sup>5</sup>

(2.) Where land of copyhold or customary tenure has been converted into freehold by enfranchisement, then, under a contract to sell and convey the freehold, the purchaser shall not have the right to call for the title to make the enfranchisement.

(3.) A purchaser of any property shall not require the production or any abstract or copy of any deed, will, or other document, dated or made before the time prescribed by law or stipulated for the commencement of the title, even though the same creates a power subsequently exercised by an instrument abstracted in the abstract furnished to the purchaser; nor shall he acquire any information or make any requisition, objection or inquiry with respect to any such deed, will, or document, or the title prior to that time, notwithstanding that any such deed, will, or other document, or that prior title, is recited, covenanted to be produced, or noticed, and he shall assume, unless the contrary appears, that the recitals contained in the abstracted instruments, of any deed, will, or other document, forming part of that prior title, are correct, and give all the material contents of the deed, will, or other document so recited, and that every document so recited was duly executed<sup>10</sup> by all necessary parties and perfected, if, and as required, by fine, recovery, acknowledgment, enrolment, or otherwise.<sup>17</sup>

(4.) Where land sold is held by lease (not including under-lease) the purchaser shall assume, unless the contrary appears, that the lease was duly granted;<sup>7</sup> and, on production of the receipt for the last payment due for rent under the lease before the date of actual completion of the purchase, he shall assume, unless the contrary appears, that all covenants and provisions of the lease have been duly performed and observed up to the date of the actual completion of the purchase.<sup>18</sup>

(5.) Where land sold is held by underlease, the purchaser shall assume, unless the contrary appears, that the underlease and every superior lease were duly granted;<sup>7</sup> and, on production of the receipt for the last payment due for rent under the underlease before the date of actual completion of the purchase, he shall assume, unless the contrary appears, that all the covenants and provisions of the underlease have been duly performed and observed up to the date of the actual completion of the purchase, and further, that all rent due under every superior lease, and all the covenants and provisions of every superior lease, have been paid and duly performed and observed up to that date.<sup>18</sup>

37 & 38  
Vict. c. 78,  
§ 2.  
44 & 45  
Vict. c. 41,  
§ 3.

Rule V.  
Receipt for  
rent on sale  
of under-  
lease.

(6.) On a sale of any property, the expenses of the production and inspection of all Acts of Parliament, inclosure awards, records, proceedings of courts, court rolls, deeds, wills, probates, letters of administration, and other documents, not in the vendor's possession,<sup>19</sup> and the expenses of all journeys incidental to such production or inspection, and the expenses of searching for, procuring, making, verifying and producing all certificates, declarations, evidences, and information not in the vendor's possession, and all attested, stamped, office, or other copies or abstracts of, or extracts from, any Acts of Parliament, or other documents aforesaid, not in the vendor's possession, if any such production, inspection, journey, search, procuring, making or verifying is required by a purchaser, either for verification of the abstract, or for any other purpose, shall be borne by the purchaser who requires the same; and where the vendor retains possession of any document, the expense of making any copy thereof, attested or unattested, which a purchaser requires to be delivered to him, shall be borne by that purchaser.<sup>14</sup>

Rule VI.  
Costs of  
production  
of docu-  
ments not  
in vendor's  
possession.

(7.) On a sale of any property in lots, a purchaser of two or more lots, held wholly or partly under the same title, shall not have a right to more than one abstract of the common title, except at his own expense.<sup>20</sup>

C. A.  
Rule VII.  
Single ab-  
stract of  
title com-  
mon to  
several  
lots.

(8.) This section applies only to titles and purchasers on

37 & 38  
Vict. c. 78,  
**§ 2.**  
44 & 45  
Vict. c. 41,  
**§ 3.**

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sales properly so called, notwithstanding any interpretation in this Act.<sup>21</sup>

(9.) This section applies only if and as far as a contrary intention is not expressed in the contract of sale, and shall have effect subject to the terms of the contract and to the provisions therein contained.

(10.) This section applies only to sales made after the commencement of this Act.

(11.) Nothing in this section shall be construed as binding a purchaser to complete his purchase in any case where, on a contract made independently of this section, and containing stipulations similar to the provisions of this section, or any of them, specific performance of the contract would not be enforced against him by the Court.<sup>22</sup>

44 & 45  
Vict. c. 41,  
**§ 13.**

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Title to  
leasehold  
reversion  
on sale of  
under-  
lease.

[13. (1.) On a contract to grant a lease for a term of years to be derived out of a leasehold interest, with a leasehold reversion, the intended lessee shall not have the right to call for the title to that reversion.<sup>5</sup>

(2.) This section applies only if and as far as a contrary intention is not expressed in the contract, and shall have effect subject to the terms of the contract, and to the provisions therein contained.

(3.) This section applies only to contracts made after the commencement of this Act.]

45 & 46  
Vict. c. 39,  
**§ 4.**

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Contract  
for lease  
under  
power not  
part of  
title.

[4. (1.) Where a lease is made under a power contained in a settlement, will, Act of Parliament, or other instrument any preliminary contract for or relating to the lease shall not, for the purpose of the deduction of the title to an intended assign, form part of the title, or evidence of the title to the lease.

(2.) This section applies to leases made either before or after the commencement of this Act.]

<sup>2</sup> Provisions similar to those embodied in s. 2 of the V. and P. Act and ss. 3 and 13 of the C. A., 1881, had previously been inserted in conditions of and contracts for sale of land. In some few cases the stipulations in general use are more favourable to the vendor than the statutory provisions, and will probably continue to be used, notwithstanding this



enactment. In other cases, which are pointed out below, the stipulations hitherto used may be safely omitted, in reliance upon these rules, while in some few cases it will be well to try to obtain some modification of the statutory provisions in favour of the purchaser.

37 & 38  
Vict. c. 78,  
§ 2.

<sup>2</sup> This rule is limited to a "term of years," and does not appear to apply to leaseholds for lives.

Rule I.  
Produ-  
tion of  
lessor's  
title.

<sup>4</sup> "A person who agrees to let land agrees to grant a *valid* lease, as a person who agrees to sell land agrees to execute a *valid* conveyance of it." *Per* WILLES, J. (t). Therefore, in the absence of express stipulation, an intended lessee was entitled to satisfy himself by investigation of his lessor's title, that the lessor had power to grant such a lease as had been agreed upon. And the same rule applied to a sale of leaseholds, except where the lease had been granted by a bishop (u), or, perhaps, by a dean and chapter. In the case of lessor and lessee there was usually no inconvenience in this rule; but upon a *sale* of leaseholds the vendor is frequently unable to produce his lessor's title, and it therefore became necessary to negative the purchaser's right to such production.

<sup>5</sup> Rule I., s. 2, of the V. and P. Act, did not go far enough, as it only negatived the right to call for the title to the freehold; and therefore the statutory provisions for the protection of lessors and vendors of leaseholds were extended by s. 3 (1) and s. 13 of the C. A., 1881.

<sup>6</sup> Upon a sale of leaseholds the condition in general use before the V. and P. Act was to the effect that "the purchaser shall not call for the production of, or investigate or make any objection or requisition in respect of the title of the lessor, *or the right to grant the lease*;" and the writer has, in some cases, substituted the clause:—"or any title prior to or other than the said lease; and such lease shall be deemed valid and well granted," for the words in italics. It will be noticed that these conditions are much more comprehensive than the provision of Rule I.; and it was an open question whether the latter would preclude a purchaser of leaseholds from inquiring into the lessor's title and insisting upon an answer to any requisition which would not necessitate its actual production. One of the most eminent of living conveyancers expressed an opinion that it would not (x).

<sup>7</sup> But now, a purchaser of leaseholds is, under s. 3 (4) and (5) of the C. A., 1881, bound to assume that the lease was well granted "unless the contrary appears." It may be observed that a condition that "the lessor's title will not be shown *and shall not be inquired into*" has been held to mean that the title should be accepted without objection or inquiry, and to preclude the purchaser from raising an objection disclosed by Acts of Parliament (y). The effect of the three provisions

(t) *Stranks v. St. John*, L. R. 2 C. P. 376—380.

(u) *Fane v. Spencer*, 2 Mer. 430.

(x) *Dart, V. & P.* (5th ed.), 168.

(y) *Hume v. Bentley*, 5 De G. & S. 520.



37 & 38  
Vict. c. 78,  
§ 2. is that on a contract to *assign* a lease or underlease, the title of the lessor—whether freehold or leasehold—cannot be called for, and that on a contract by a freeholder to *grant* a lease, the title of the intending lessor cannot be called for; but that on a contract to *grant* an underlease, the lease under which the intending lessor holds and any intermediate assurances may, but the reversion expectant on such lease, whether freehold or leasehold, may not be called for. On the other hand, a condition that “no requisition or inquiry shall be made respecting the title of the lessor or his superior landlord, or his right to grant such underlease,” was held not to preclude the purchaser from objecting that, upon the face of the abstract, it appeared from recitals that the lessor had no power to grant the lease (z). In the one case the examination of the Acts of Parliament involved an inquiry; in the other the defect was patent, without any inquiry. See also and compare *Smith v. Robinson* (a).

Rule I. of s. 3 of the V. and P. Act does not alter the rule that a lessee has constructive notice of his lessor's title, nor relieve him from any consequence of such constructive notice—it only puts him in the same position as if he had agreed not to investigate the lessor's title (b). A lessee or purchaser of a lease will, therefore, act wisely in stipulating that notwithstanding the statutory provisions, the lessor or vendor shall deduce a good title, especially where the interest of the lessee is of great value.

Rule II. Recitals to be evidence. The usual condition as to recitals is that “every deed or document dated more than twenty years ago shall be *conclusive* evidence of everything recited, stated, noticed, *assumed or implied* therein” (c). Rule II. of the V. and P. Act does not in terms extend to matters “assumed or implied,” and will probably be held to apply only to direct statements by recital or otherwise (d). Where an abstract commenced with a deed more than twenty years old containing a recital that the vendor was seised in fee, it was held that no earlier title need be shewn (e); but practitioners cannot be advised to rely upon this decision.

Recitals in abstracted muniments of instruments dated prior to the stipulated commencement of title, or in the absence of any stipulation dated more than forty years before the contract, are now, under s. 3 (3) of the C. A., 1881, *prima facie* evidence of the contents of the instrument so recited. But a special condition is still necessary to make subsequent recitals evidence of statements in abstracted deeds less than twenty years old.

(z) *Waddell v. Wolfe*, L. R. 9 Q. B. 21.

(a) 13 Ch. D. 148.

(b) *Patman v. Harland*, 17 Ch. D. 353.

(c) 1 Dav. Conv., 4th ed., 609.

(d) See *Buchanan v. Poppleton*, 4 C. B. N. S. 20; *Gould v. White*, K. 683—687.

(e) *Bolton v. London School Board*, 7 Ch. D. 766.

It is doubtful whether the ordinary condition extends to conclusions of law, and the same doubt applies equally to the rule under discussion. It is often advisable to extend the ordinary condition specifically to "facts, matters, and conclusions of law," instead of relying upon the general expression "everything."

37 & 38  
Vict. c. 78,  
§ 2.

It is also doubtful whether (in the absence of any misrepresentation in the condition) the ordinary condition precludes the purchaser from proving the inaccuracy of the recitals or statements to which it refers *aliunde* (e).

<sup>9</sup> If it were limited to "sufficient" instead of "conclusive" evidence the better opinion is that it would not, but the writer is not aware of any express decision upon the point.

On the whole the new enactment may fairly be relied upon where it is merely desired to make recitals evidence of *facts*: but if it is necessary to include matters assumed or implied, or conclusions of law, an express condition will still be necessary. In practice it is occasionally convenient to fix a shorter limit than twenty years; and such a stipulation is seldom, if ever, found to prejudice a sale.

<sup>10</sup> The condition is sometimes extended to the "material contents and due execution" of recited documents of which the vendor has no copies, and cannot obtain production; but as to documents prior to the commencement of the abstract, this is now provided for by s. 3 (3) of the C. A., 1881.

<sup>11</sup> Recitals in recent private Acts were not evidence before this enactment (f), nor were recitals in public Acts conclusive evidence (g).

<sup>12</sup> Hitherto where the deeds were not handed over no purchaser was compelled to complete without a legal covenant for their production, even though he would have an equitable right to compel production (h). Rule III. Covenants for production of deeds.

An acknowledgment of right to production is now substituted for the covenant for production, to which a purchaser was formerly entitled. See s. 9 of the C. A., 1881 (i), and notes thereto.

"A legal covenant is, of course, a covenant framed as to run with the land at law; but it is by no means clear what is meant by *an equitable right to production*, or how such a right can be enforced, except, perhaps, against a holder of the deeds who took them with notice of the liability to produce them (k)." Compare s. 9 (7) of the C. A., 1881, p. 231, *post*.

The subject of equitable right to production is treated of by Mr. Copinger in the third chapter of his work on "Title Deeds" (l), and by

(e) *Drysdale v. Mace*, 5 D. M. G. 555.  
103—107.

(f) *Cowell v. Chambers*, 21 B. 619;  
*Shrewsbury Peerage Case*, 7 H. L. C.  
1—13.

(g) *Rez v. Greene*, 6 A. & E. 548,

(h) *Barclay v. Raine*, 1 Sim. & Stu.

449.

(i) 44 & 45 Vict. c. 41, p. 229, *post*.

(k) *Dart, V. & P.*, 5th ed., 143.

(l) Pp. 50, 70.

37 & 38  
Vict. c. 78,  
§ 2.

Mr. Dart in the ninth chapter of his work on "Vendors and Purchasers" (*m*). Mr. Davidson remarks that "the framer of the Act thought it better to leave the meaning of the words *equitable right to production* to be settled, if necessary, judicially, rather than to attempt to define it" (*n*). It has not yet been so settled.

It has been usual to guard against this right, where necessary, by some such condition as the following:—"The purchaser shall not . . . . make any objection on the ground of any existing covenant for the production of muniments of title being invalid or insufficient, or not running with the land or otherwise, nor require any other covenant for the production of any such muniments, nor make any objection on account of the absence thereof, but shall be satisfied in all respects with such existing covenant" (*o*). A shorter and equally effectual condition, for which the writer is indebted to Mr. Dart, is in the following words:—"No objection or requisition shall be made on the ground of the absence or imperfection of any covenants. . . . for the production of muniments of title."

Where it is clear that the purchaser will have an equitable right to production, the statutory provision may be safely relied upon; but until the words "equitable right" have received a judicial interpretation it will be more prudent, in most cases, to insert a short condition in the usual way. The condition should, now, be extended so as to include an acknowledgment and undertaking under s. 9 of the C. A., 1881.

Rule IV.  
Expense  
of cove-  
nants for  
produc-  
tion.

<sup>13</sup> Before this enactment a purchaser under an open contract was entitled to be furnished, at the vendor's expense, with attested copies (*p*), and covenants for the production of the originals (*q*) of all such deeds as were not handed over to him, and were necessary to make out a marketable title (*r*). Now he is entitled to an acknowledgment of right to production, and except in the case of a fiduciary vendor, to an undertaking for safe custody, instead of a covenant, but such acknowledgment and undertaking must, under this rule, be at his own expense. The usual form of condition is given in the next note. It will be observed that the rule under discussion leaves the right to attested copies untouched, and a vendor was, in the absence of express stipulation to the contrary, bound to furnish attested copies of deeds not handed over, at his own expense, until 31st December, 1881.

<sup>14</sup> But now the last clause of rule 6 of s. 3 of the C. A., 1881, throws the expense of such copies upon the purchaser. The provisions of this rule may be compared with the following special condition, which it is intended to supersede, and which may, for the future, be safely

(*m*) Pp. 409—414, 5th ed.

(*n*) 2 Dav. Conv. (Part 1), 4th ed., 6.

(*o*) 1 Dav. Conv., 4th ed., 610.

(*r*) *Dare v. Tucker*, 6 Ves. 460.

(*q*) *Cooper v. Emery*, 1 Phil. 388.

(*r*) See Dart V. & P., 5th ed., 676—7; Cop. Tit. Deeds, 120; and 1 Dav. Conv., 4th ed., 590.

omitted:—"The expense of the production, inspection, and examination, and of making and furnishing abstracts of all deeds, documents, evidences, and muniments of title (if any) not in the vendor's possession, and of obtaining, making, and producing all office, attested, and other copies of, or extracts from, records, registers, deeds, wills, probates, letters of administration, and other documents, whether in the vendor's possession or not, and of obtaining, making, and producing all declarations, certificates, and other evidence whatever, not in the vendor's possession, and of obtaining any information not in the vendor's knowledge, whether such production, inspection, examination, copies, extracts, declarations, certificates, or other evidence or information shall be required for the completion or verification of the title or abstract, or for any other purpose, shall be borne by the purchaser" (s).

37 & 38  
Vict. c. 78,  
§ 2.

Sometimes it was provided that "no objection or requisition shall be made in respect of the non-production of the original or an attested copy of any instrument recited in abstracted documents of a specified age; and that if the purchaser shall require any office, attested, or other copy of or extract from any document [so recited], whether in the vendor's possession or not, and whether for the purpose of verifying the abstract or of accompanying or completing the title, or otherwise, the expense of complying with every such requisition shall be borne by the purchaser."

<sup>15</sup> Under an open contract, the vendor was, before 31st December, 1874, entitled to retain the deeds on covenanting to produce them, if the property he retained was of greater value than any of the lots he sold. Mr. Dart (t) was of opinion that he might retain them if he retained any portion of the property, irrespective of the question of value; while Lord St. Leonards (u) considered that the holder of the portion of highest value was entitled to them, whether vendor or purchaser.

Rule V.  
Custody of  
title deeds.

In practice it has been usual to stipulate in the following terms:—"The vendor will retain such muniments of title as relate to other property not included in the sale, and will enter into usual covenants with the purchaser for the production and furnishing copies thereof, such covenants to be prepared by and at the expense of the purchaser; and to be expressed to be binding on the vendor and his representatives, and to render him and them responsible only while retaining the custody of the muniments, but to be binding on the muniments into whosoever hands the same may come."

No such stipulation is now necessary, but in the case of fiduciary

(s) 1 Dav. Conv., 4th ed., 609.

674.

(t) V. & P., 4th ed., 618; 5th ed.,

(u) Sug. V. & P., 14th ed., 434.

87 & 38 vendors, it may be well to provide that they shall give an acknowledg-  
 Vict. c. 78, ment only, and not any undertaking as to safe custody.

**§ 2.**

C. A.  
 Rule 3.  
 Produc-  
 tion of  
 prior title.

<sup>16</sup> Forty years before the contract (x).

<sup>17</sup> This provision, together with Rule II. of s. 2 of the V. and P. Act, renders unnecessary the following conditions, which, with more or less modification, have hitherto been used :—

“The purchaser shall not require the production of, or investigate, or make any objection or requisition in respect of the prior title, whether such prior title appear by recital, statement, covenant for production or otherwise, or do not appear at all.

“Every deed and document dated more than twenty years ago shall be conclusive evidence of everything recited, stated, noticed, assumed, or implied therein, and of the contents and due execution of every deed, will and other document recited, stated, or noticed therein, and of which neither the original nor an attested copy, nor the probate, nor an office copy, nor an effective covenant for production is in the vendor's possession; and shall also be conclusive evidence that no such recited, stated, or noticed deed, will, or other document contained anything material to the title other than what is so recited, stated, or noticed; and the purchaser shall not require the production of, or make any objection or requisition in respect of, any such deed, will, or document.”

Sometimes the following more stringent form of condition has been used :—

“The purchaser shall not be at liberty to require, investigate, or object to any title or evidence of title, or any other matter whatsoever, prior to the stipulated commencement, notwithstanding any reference to or notice of any prior documents; and every abstracted document of title dated more than sixteen years prior to the day of sale shall be accepted as conclusive evidence of the facts, matters, and conclusions of law recited, stated, assumed, or implied therein, and also of the material contents and due execution of all instruments therein recited or noticed, and of which the vendors have neither the original nor attested copies, whether the vendors have covenants for the production or not; and no objection or requisition shall be made in respect of the non-production of the original or an attested or other copy of any instrument so recited or noticed, or of any instrument enrolled for safe custody and accessible to the purchaser, or of any instrument of which the vendors shall produce what purports to be an attested copy; and no abstract in chief shall be required of any document so recited or noticed, and of which the vendors have neither the original nor a copy; and no objection or requisition shall be made on the ground of the absence or imperfection of any covenants for title or covenants for the production of muniments of title.”

(x) V. & P. Act, s. 1, p. 185, *ante*.

It will be observed that the words of the statutory provision as to recitals of prior documents being evidence of the material contents and due execution are more comprehensive than either of the above forms.

37 & 38  
Vict. c. 78,  
§ 2.

<sup>18</sup> As to the assumption that the lease is well granted, see note 7, *ante*, p. 193. The provision making the receipt for the last rent which accrued due *prima facie* evidence of the due performance of covenants and conditions, renders unnecessary a condition which has been almost invariably used in sales of leasehold property.

C. A.  
Rules IV.  
and V.

Produc-  
tion of re-  
ceipt for  
last rent  
evidence  
of due per-  
formance  
of cove-  
nants.

<sup>19</sup> As to this provision see note 14, *ante*, p. 196. It differs from the condition generally used in not throwing upon the purchaser the cost of making copies of documents in the vendor's possession unless such documents are retained by the vendor after completion. But, as a purchaser will seldom, if ever, require copies of documents which will be handed over to him on completion, the whole of the usual condition may be omitted in reliance on the statutory provision.

C. A.  
Rule VI.  
Costs of  
produc-  
tion.

<sup>20</sup> This provision renders unnecessary a condition very commonly inserted on a sale of land in several lots.

C. A.  
Rule VII.  
Single ab-  
stract of  
common  
title.

<sup>21</sup> See the meaning of "purchaser" and "sale" as defined by s. 2 (8) (y).

<sup>22</sup> Notwithstanding the statutory provisions a vendor who is aware of and does not disclose the existence of any material fact contrary to what the purchaser is bound to assume under s. 3 of the C. A., 1881, will be unable to enforce specific performance.

3. Trustees who are either vendors or purchasers may sell or buy without excluding the application of the second section of this Act.<sup>1</sup>

37 & 38  
Vic c. 78,  
§ 3.

<sup>1</sup> Trustees who adopt the provisions of the C. A., 1881, are also protected by s. 66 of that Act (z).

Rules to  
apply to  
sale or pur-  
chase by  
trustees.

#### LEGAL ESTATE.—MORTGAGEE OR TRUSTEE.

4. The legal personal representative of a mortgagee of a freehold estate, or of a copyhold estate to which the mortgagee shall have been admitted, may, on payment of all sums secured by the mortgage,<sup>1</sup> convey or surrender the mortgaged estate, whether the mortgage be in form an assurance subject to redemption, or an assurance upon trust.

37 & 38  
Vict. c. 78,  
§ 4.

Legal  
personal  
representa-  
tive of  
mortgagee  
may con-  
vey on  
payment  
of sums  
secured.

(y) P. 210, *post*.

(z) P. 317, *post*.

37 & 38  
Vict. c. 78. This section is repealed and superseded as to cases of death after 31st December, 1881, by s. 30 of the C. A., 1881 (a), p. 201, *post*.

**§ 4.**

Sect. 4  
applies  
only to  
repay-  
ment and  
recon-  
veyance.

<sup>1</sup> It was held that this section was confined to the case of payment off and reconveyance, and does not apply to a transfer, even though the consideration may amount to "all sums secured by the mortgage" (b). In such a case, if the mortgagee has died intestate prior to 31st December, 1881, as to trust and mortgage estates, leaving an infant heir, a vesting order is still necessary. This decision certainly puts a narrow construction on the word "payment," and it would seem to follow that the section does not apply to a "payment" by exercising a power of sale, even though the purchase-money may equal or exceed the amount due on the mortgage (c). And, of course, it cannot apply to any case where the mortgagee receives less than the total amount of "all sums secured by the mortgage."

37 & 38  
Vict. c. 78,  
**§ 5.**

*5. Upon the death of a bare trustee of any corporeal or incorporeal hereditament of which such trustee was seised<sup>1</sup> in fee simple, such hereditament shall vest like a chattel real in the legal personal representative from time to time of such trustee.*

This section is repealed and re-enacted, with alterations as to England, by s. 48 of the Land Transfer Act, 1875 (d), and as to Ireland by s. 73 of the C. A., 1881 (e).

Section 48 of the L. T. Act, 1875, is as follows:—

38 & 39  
Vict. c. 87,  
**§ 48.**

Estate of  
deceased  
intestate  
trustee to  
vest in his  
legal per-  
sonal  
represent-  
ative.

[48. Section five of the Vendor and Purchaser Act, 1874, shall be repealed on and after the commencement of this Act, except as to anything duly done thereunder before the commencement of this Act;<sup>1</sup> and, instead thereof, be it enacted, that upon the death of a bare trustee<sup>2</sup> intestate as to<sup>3</sup> any corporeal or incorporeal hereditament of which such trustee was seised in fee simple, such hereditament shall vest like a chattel real in the legal personal representative from time to time of such trustee; but the enactment by this section substituted for the aforesaid section of "The Vendor and Purchaser Act, 1874," shall not apply to lands registered under this Act.]

(a) 44 & 45 Vict. c. 41.

(b) *Re Brook's Mortgage*, 25 W. R. 841; *Re Spradbury's Mortgage*, 14 Ch. D. 514.

(c) Compare Dart V. & P., 5th ed., 16.

(d) 38 & 39 Vict. c. 87.

(e) P. 324 *post*.



<sup>1</sup> Where a bare trustee died intestate between the passing and repeal of s. 5, and no act had been done to get in the legal estate, on the assumption that it was vested in his legal personal representative before such repeal, it was held that the legal estate vested in his heir (*f*). 37 & 38  
Vict. c. 78,  
§ 5.

<sup>2</sup> A bare trustee is a trustee whose trust is to convey, and who would be compelled by a court of equity to do so on the application of his *cestui que trust* (*g*). Therefore this section does not apply to the case of a mortgagee dying intestate, which is provided for by s. 4, *ante*, p. 119. Nor does it apply to an unpaid vendor, nor to any other person who has a beneficial interest in the property (*h*). The case of an unpaid vendor dying is provided for by s. 4 of the C. A., 1881 (*i*). “Duly  
done there-  
under.”  
Who is a  
“bare  
trustee.”

<sup>3</sup> The words “intestate as to” were introduced because doubts had been expressed whether the original enactment rendered a devise of trust estates inoperative.

Sect. 4 of the V. & P. Act, 1874, and the above section are repealed and superseded as to cases of death after 31st December, 1881, by s. 30 of the Conveyancing Act, 1881 (*k*), which is as follows:—

[30. (1.) Where an estate or interest of inheritance, or limited to the heir as special occupant, in any tenements or hereditaments, corporeal or incorporeal, is vested on any trust, or by way of mortgage, in any person solely, the same shall on his death, notwithstanding any testamentary disposition, devolve to and become vested in his personal representatives or representative from time to time, in like manner as if the same were a chattel real vesting in them or him, and accordingly all the like powers, for one only of several joint representatives, as well as for a single personal representative, and for all the personal representatives together, to dispose of and otherwise deal with the same, shall belong to the deceased's personal representatives or representative from time to time, with all the like incidents, but subject to all the like rights, equities, and obligations, as if the same were a chattel real vesting in them or him; and, for the purposes of this section, the personal representatives, for the time being, of the deceased,

44 & 45  
Vict. c. 41,  
§ 30.

(*f*) *Christie v. Ovington*, 1 Oh. D. 279. tary Authority, 9 Oh. D. 582.

(*g*) *Ibid.*

(*h*) *Morgan v. Swansea Urban Sani-*

(*i*) P. 215, *post*.

(*k*) 44 & 45 Vict. c. 41.



37 & 38  
Vict. c. 78,

**§ 5.**

44 & 45  
Vict. c. 41,

**§ 30.**

shall be deemed in law his heirs and assigns, within the meaning of all trusts and powers.

(2.) Sect. 4 of the Vendor and Purchaser Act, 1874, and s. 48 of the Land Transfer Act, 1875, are hereby repealed.

(3.) This section, including the repeals therein, applies only in cases of death after the commencement of this Act.]

37 & 38  
Vict. c. 78,

**§ 6.**

Married  
woman  
who is  
bare  
trustee  
may con-  
vey as if  
*feme sole*.

**6.** When any freehold or copyhold hereditament shall be vested in a married woman as a bare trustee,<sup>1</sup> she may convey or surrender the same as if she were a *feme sole*.<sup>2</sup>

<sup>1</sup> As to the meaning of "bare trustee" see note 2 on p. 201, *ante*.

<sup>2</sup> Before this enactment no married woman who was a trustee or executrix could convey the trust property without the concurrence of her husband. And this section only applies to the case of a married woman who is a *bare trustee*. But a married woman who becomes entitled as trustee or executrix to property—whether real or personal—after 31st December, 1882, may, by virtue of ss. 1, 18 and 24 of the Married Women's Property Act, 1882, deal with such property as if she were a *feme sole*. Those sections are as follows:—

45 & 46  
Vict. c. 75,

**§ 1.**

Married  
woman to  
be capable  
of holding  
property  
and of con-  
tracting as  
a *feme sole*.

[1. (1.) A married woman shall, in accordance with the provisions of this Act, be capable of acquiring, holding, and disposing by will or otherwise, of any real or personal property as her separate property, in the same manner as if she were a *feme sole*, without the intervention of any trustee.

(2.) A married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of suing and being sued, either in contract or in tort, or otherwise, in all respects as if she were a *feme sole*, and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding brought by or taken against her; and any damages or costs recovered by her in any such action or proceeding shall be her separate property; and any damages or costs recovered against her in any such action or proceeding

shall be payable out of her separate property and not otherwise. 37 & 38  
Vict. c. 78,  
§ 6.

(3.) Every contract entered into by a married woman shall be deemed to be a contract entered into by her with respect to and to bind her separate property, unless the contrary be shown. 45 & 46  
Vict. c. 75,  
§ 1.

[18. A married woman who is an executrix or administratrix alone or jointly with any other person or persons of the estate of any deceased person, or a trustee alone or jointly as aforesaid of property subject to any trust, may sue or be sued, and may transfer or join in transferring any such annuity or deposit as aforesaid, or any sum forming part of the public stocks or funds, or of any other stocks or funds transferable as aforesaid, or any share, stock, debenture, debenture stock, or other benefit, right, claim, or other interest of or in any such corporation, company, public body, or society in that character, without her husband, as if she were a *feme sole*.] 45 & 46  
Vict. c. 75,  
§ 18.  

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Married  
woman as  
an execu-  
trix or  
trustee.

[24. The word "contract" in this Act shall include the acceptance of any trust, or of the office of executrix or administratrix,<sup>1</sup> and the provisions of this Act as to liabilities of married women shall extend to all liabilities by reason of any breach of trust or devastavit committed by any married woman being a trustee or executrix or administratrix either before or after her marriage, and her husband shall not be subject to such liabilities unless he has acted or intermeddled in the trust or administration. The word "property" in this Act includes a thing in action.] 45 & 46  
Vict. c. 75,  
§ 24.  

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Interpre-  
tation of  
terms.

<sup>1</sup> A married woman may, therefore, now take out letters of administration without the consent of her husband, and notwithstanding his refusal to join in the administration bond (*l*).

7. After the commencement of this Act, no priority or protection shall be given or allowed to any estate, right or interest in land by reason of such estate, right, or interest being protected by or tacked to any legal or other estate or 37 & 38  
Vict. c. 78,  
§ 7.  

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Tacking  
abolished

(*l*) *Re Ayres*, 27 Sol. J. 467.

37 & 38  
Vict. c. 78,  
§ 7.

as regards  
transac-  
tions be-  
tween  
Aug. 7,  
1874, and  
Jan. 1,  
1876.

*interest in such land ; and full effect shall be given in every Court to this provision, although the person claiming such priority or protection as aforesaid shall claim as a purchaser for valuable consideration and without notice : Provided always, that this section shall not take away from any estate, right, title, or interest any priority or protection which but for this section would have been given or allowed thereto as against any estate or interest existing before the commencement of this Act.*

This section is now repealed as to England by s. 129 of the Land Transfer Act, 1875 (*m*), which is as follows:—

38 & 39  
Vict. c. 87,  
§ 129.

Repeal of  
37 & 38  
Vict. c. 78,  
s. 7.

[129. The seventh section of the Vendor and Purchaser Act, 1874, is hereby repealed, as from the date at which it came into operation, except as to anything duly done thereunder before the commencement of this Act.<sup>1</sup>]

<sup>1</sup> See the first note to s. 48 of the Land Transfer Act (*n*). See also *Robinson v. Trevor* (*o*).

<sup>2</sup> As to Ireland, ss. 5 and 7 of the V. & P. Act, 1874, are repealed by s. 73 of the C. A., 1881, which is as follows:—

44 & 45  
Vict. c. 41,  
§ 73.

[73. (1.) Sect. 5 of the Vendor and Purchaser Act, 1874, is hereby repealed from and after the commencement of this Act, as regards cases of death thereafter happening ; and s. 7 of the Vendor and Purchaser Act, 1874, is hereby repealed as from the date at which it came into operation.

(2.) This section extends to Ireland only.]

37 & 38  
Vict. c. 78,  
§ 8

Non-regis-  
tration of  
wills in  
Middlesex  
or York-  
shire.

8. Where the will of a testator devising land in Middlesex or Yorkshire has not been registered within the period allowed by law in that behalf,<sup>1</sup> an assurance of such land to a purchaser or mortgagee by the devisee or by some one deriving title under him shall, if registered before, take precedence of and prevail over any assurance from the testator's heir-at-law.

<sup>1</sup> Within six months of the testator's death ; or within three years if he died upon or beyond the seas (*p*). In Middlesex, if a will is

(*m*) 38 & 39 Vict. c. 87.

(*n*) P. 201, *ante*.

(*o*) 12 Q. B. D. 423.

(*p*) 7 Anne, c. 20, s. 8 ; 2 & 3 Anne, c. 4, s. 21 ; 6 Anne, c. 62 (c. 35 in Ruffhead), s. 14 ; 8 Geo. 2, c. 6, s. 15.

contested, the time is two years ; if it is concealed or suppressed, five years ; and if there is any other inevitable obstacle to registration, four years (*p*). In Yorkshire, the time, in case of contest or other inevitable difficulty, is extended to six months after the removal of the difficulty (*q*).

37 & 38  
Vict. c. 78,  
§ 8.

## APPLICATIONS IN CHAMBERS.

9. A vendor or purchaser<sup>1</sup> of real or leasehold estate in England, or their representatives respectively, may at any time or times and from time to time apply in a summary way to a judge of the Court of Chancery<sup>2</sup> in England in chambers,<sup>3</sup> in respect of any requisitions or objections, or any claim for compensation, or any other question<sup>4</sup> arising out of or connected with the contract (not being a question affecting the existence or validity of the contract), and the judge shall make such order upon the application as to him shall appear just, and shall order how and by whom all or any of the costs of and incident to the application shall be borne and paid.<sup>5</sup>

37 & 38  
Vict. c. 78,  
§ 9.

Vendors  
and pur-  
chasers  
may apply  
to judge  
in cham-  
bers to de-  
cide ques-  
tions.

A vendor or purchaser of real or leasehold estate in Ireland, or their representatives respectively, may in like manner and for the same purpose apply to a judge of the Court of Chancery<sup>6</sup> in Ireland, and the judge shall make such order upon the application as to him shall appear just, and shall order how and by whom all or any of the costs of and incident to the application shall be borne and paid.

<sup>1</sup> This section, in terms, only applies to questions between vendor and purchaser. Such a provision with regard to questions between a mortgagor and mortgagee is unnecessary, for a proposed mortgagee, who was dissatisfied with the mortgagor's title, would simply decline to advance his money on the proposed security. Where questions arose upon a *gift* of land for the site of a church, under 36 & 37 Vict. c. 50, s. 1, it was doubted whether this section applied, and the difficulty was got over by making the transaction a sale for a nominal consideration (*r*). Whether or not it applies to questions

Sect. 9  
applies  
only to  
sales.

(*p*) 7 Anne, c. 20, ss. 9, 10.

Geo. 2, c. 6, s. 16.

(*q*) 2 & 3 Anne, c. 4, s. 22 ; 6 Anne,

(*r*) *Re Marquis of Salisbury*, 23 W.

c. 62 (c. 35 in Ruffhead), s. 15 ; 8

R. 824.

87 & 38  
Vict. c. 78,  
§ 9.

between lessor and lessee has not, so far as the writer is aware, been decided. A lessee who pays a premium might fairly be considered a "purchaser of . . . . leasehold estate;" and it is observable that while s. 1 speaks of "any contract for sale of land," the first rule of s. 2, which applies to "any such contract as aforesaid," expressly mentions, "a contract to grant" as well as to assign "a term of years." In contracts between lessor and lessee, questions often arise as to the covenants, &c., to be inserted in the lease, which could be much more cheaply and expeditiously settled under this section (assuming it to apply) than by an action for specific performance.

<sup>2</sup> Now the Chancery Division of the High Court of Justice (s).

Summons  
may be  
adjourned  
into Court.

<sup>3</sup> The Act compels a judge to hear questions argued in chambers (t), but if he wishes to hear further argument he may adjourn the summons into Court (u). In cases where the decision is in favour of the title, judgment will be delivered in Court, if the purchaser desires it in order to strengthen his title (x).

Applies to  
questions  
of fact as  
well as  
law.

<sup>4</sup> It was at one time thought that questions of law or construction only, and not disputed questions of fact, could be decided upon a summary application under this section (y). But it has now been decided by the Court of Appeal that "whatever could be done in chambers, upon a reference as to title under a decree where the contract was established," in an action for specific performance, can be done upon a summons under this section (z). And in one case the judge settled the form of a covenant to be inserted in the conveyance (a).

In case of disobedience to an order under this section, an application to enforce it should be made in chambers, and if an action for specific performance is commenced instead it will be dismissed with costs (b).

The time for an appeal from a decision or order under this section is twenty-one days (c).

The following are some of the questions which have already been decided under this beneficial enactment:—

Questions  
decided  
under this  
section.

Whether under general devises by a mortgagee (d) and trustee (e), the legal estate in mortgaged and trust property respectively passed. Whether a power of sale authorizes a partition (f). Who were the particular per-

(s) 36 & 37 Vict. c. 66, s. 34 (2).

(t) *Re Coleman & Jarrom*, 4 Ch. D. 165—168.

(u) *Re Cooper, Allen & Harlech*, 4 Ch. D. 802; *Re Brown & Sibly*, 3 Ch. D. 156; *Re Popple & Barratt*, 25 W. R. 248.

(x) *Re Coleman & Jarrom*, 4 Ch. D. 165, 168.

(y) *Re Popple & Barratt*, 25 W. R. 248.

(z) *Re Burroughs, Lynn & Sexton*,

5 Ch. D. 601.

(a) *Re Gray & M. R. Co.*, 44 L. T. 567.

(b) *Thompson v. Ringer*, 29 W. R. 520.

(c) *Re Blyth & Young*, 13 Ch. D. 416.

(d) *Re Packman & Moss*, 1 Ch. D. 214.

(e) *Re Brown & Sibly*, 3 Ch. D. 156

(f) *Re Frith & Osborne*, 3 Ch. D. 618.

sons entitled under a devise to a class (*g*). Whether the rule in Shelley's case applies to wills as well as to deeds (*h*). Whether an estate tail was well barred (*i*). Whether an attempted limitation was void for remoteness (*k*). Whether a post nuptial settlement was void, as against a subsequent mortgagee without notice (*l*). What succession duty was payable, and upon what events (*m*). Whether a father is a guardian capable of consenting to a gift of an infant's land for the site of a church under 36 & 37 Vict. c. 50, s. 1 (*n*). Whether a married woman who has obtained a protection order can give a valid receipt for a legacy without her husband's concurrence (*o*). Whether a mortgagee of a life estate and reversion under separate instruments containing the usual powers, can sell the fee simple in possession under his separate powers of sale, the purchase-money being apportioned (*p*). Whether two surviving trustees had power to sell without the concurrence of the beneficiaries, where powers of sale and management had been given to them jointly with a deceased trustee who was also tenant for life (*q*). Whether the devisee in trust (*r*) or the customary heir (*s*) of a last surviving trustee could exercise a trust for sale. Whether an administrator with will annexed could sell real estate (*t*). Whether the survivor of two trustees in bankruptcy could convey alone (*u*). Whether the survivor of two joint official liquidators could affix the seal of the company to an instrument which merely carried out an agreement entered into by himself and his colleague for the sale of part of the assets of the company (*x*). Whether an abstracted deed was properly stamped (*y*). Whether the vendor had shown a title to the soil or only to rights of pasturage (*z*). Whether, upon a purchase at £100 per acre, part of a drain which bounded the property and which was included in the conveyance was to be taken into account in calculating the purchase-money (*a*). Whether the purchaser can insist upon an answer from the vendor and his solicitor to the usual requisition as to the existence of incumbrances

87 & 38  
Vict. c. 78,  
§ 9.

(*g*) *Re Coleman & Jarrom*, 4 Ch. D. 165.

(*h*) *White & Hindle's Contract*, 7 Ch. D. 201.

(*i*) *Re Dudson*, 27 W. R. 179.

(*k*) *Re Brown & Sibly*, 3 Ch. D. 156.

(*l*) *Re Foster & Lister*, 25 W. R. 553.

(*m*) *Re Cooper, Allen & Harlech*, 4 Ch. D. 802.

(*n*) *Re Marquis of Salisbury*, L. R. 20 Eq. 527; 2 Ch. D. 29.

(*o*) *Re Coward & Adam*, L. R. 20 Eq. 179.

(*p*) *Re Cooper, Allen & Harlech*, 4 Ch. D. 802.

(*q*) *Re Cooke's Contract*, 4 Ch. D. 454.

(*r*) *Osborne to Rowlett*, 13 Ch. D. 774.

(*s*) *Re Morton & Hallett*, 15 Ch. D. 143.

(*t*) *Re Clay & Tetley*, 16 Ch. D. 3.

(*u*) *Re Waddell's Contract*, 2 Ch. D. 192.

(*x*) *Re Metropolitan Bank & Jones*, 2 Ch. D. 366.

(*y*) *Whiting to Loomes*, 14 Ch. D. 882; 17 Ch. D. 10.

(*z*) *Re Burroughs, Lynn & Sexton*, 5 Ch. D. 601.

(*a*) *Re Popple & Barratt*, 25 W. R. 248.

87 & 38  
Vict. c. 78,  
**§ 9.**

and objections to title (b). Whether a vendor who declines to pay off an equitable mortgage (c) or who knowingly sells with a defective title can take advantage of the usual condition, giving him power to rescind if the purchaser insists upon any objection or requisition which he declines to remove or comply with (d). Whether a purchaser from a compounding debtor can require evidence that the several instalments of the composition are paid or secured (e). Whether a purchaser can obtain compensation for misdescription after conveyance (f). Whether a disputed covenant ought to be inserted in the conveyance (g). What is a "rent having no money value" under s. 65 of the C. A., 1881 (h).

Costs.

<sup>5</sup> The costs of a summons will usually follow the event (i), even though the Court holds a title to be good which a conveyancer would not advise a purchaser to accept (k). But where the difficulty arose entirely from conflicting authorities no order was made as to costs, though the vendor was successful (l). And the same course was adopted where the question was one which a purchaser might fairly raise (m). But where a purchaser's summons was successful upon one point, and failed upon another, the vendor was ordered to pay his costs (n). And in one case, as reported, it appears that vendors who took out a summons and were successful upon both points, were ordered to pay costs (o). The questions raised in this case were, however, of considerable importance and some difficulty, and gave rise to a long and elaborate judgment.

<sup>6</sup> Now the High Court of Justice in Ireland (p).

87 & 38  
Vict. c. 78,  
**§ 10.**

**10.** This Act shall not apply to Scotland, and may be cited as the Vendor and Purchaser Act, 1874.

Extent  
and short  
title of  
Act.

(b) *Re Solomon & Davey*, 19 Sol. J. 715—846; *Re Ford & Hill*, 10 Ch. D. 865.

(c) *Re Jackson & Oakshott*, 14 Ch. D. 851.

(d) *Re Phillips & Penfold*, 19 Sol. J. 801.

(e) *Re Kearley & Clayton's Contract*, 7 Ch. D. 615.

(f) *Re Turner & Skelton*, 13 Ch. D. 130.

(g) *Re Gray & M. R. Co.*, 44 L. T. 567.

(h) *Re Smith & Stott*, 31 W. R. 411.

(i) *Re Packman & Moss*, 1 Ch. D. 214; *Re Waddell's Contract*, 2 Ch. D. 172; 3 Not. 2794; *Re Cooke's Con-*

*tract*, 4 Ch. D. 454; *Re Burroughs, Lynn & Sexton*, 5 Ch. D. 601; *Re Popple & Barratt*, 25 W. R. 248; *Re Phillips & Penfold*, 19 Sol. J. 301.

(k) *Osborne to Rowlett*, 18 Ch. D. 774.

(l) *Ibid.*

(m) *Re Coward & Adam*, L. R. 20 Eq. 179; *Re Kearley & Clayton's Contract*, 7 Ch. D. 615.

(n) *Re Solomon & Davey*, 19 Sol. J. 715.

(o) *Re Cooper, Allen & Harlech*, 4 Ch. D. 802.

(p) 40 & 41 Vict. c. 57, ss. 4, 5, 21, 36.

# THE CONVEYANCING AND LAW OF PROPERTY ACT, 1881.

AS AMENDED BY

## THE CONVEYANCING ACT, 1882.

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44 & 45 Vict. c. 41.

*An Act for simplifying and improving the practice of Conveyancing; and for vesting in Trustees, Mortgagees, and others various powers commonly conferred by provisions inserted in Settlements, Mortgages, Wills, and other Instruments; and for amending in various particulars the Law of Property; and for other purposes.*

Be it enacted, &c.

### I.—PRELIMINARY.

1.—(1.) This Act may be cited as the Conveyancing and Law of Property Act, 1881.<sup>1</sup>

(2.) This Act shall commence and take effect from and immediately after the thirty-first day of December, one thousand eight hundred and eighty-one.

(3.) This Act does not extend to Scotland.

44 & 45  
Vict. c. 41,  
§ 1.

Short  
title;  
commence-  
ment;  
extent.

<sup>1</sup> This Act was amended by the Conveyancing Act, 1882, which takes effect from the 31st of December, 1882, and, like this Act, does not extend to Scotland. By s. 1 of the Act of 1882, the two Acts may be cited together as "the Conveyancing Acts, 1881 and 1882."



## INTERPRETATION CLAUSE.

44 & 45  
Vict. c. 41,  
§ 2.

2. In this Act—

Interpre-  
tation of  
property,  
land, &c.

(i.) Property, unless a contrary intention appears, includes real and personal property, and any estate or interest in any property real or personal, and any debt, and any thing in action, and any other right or interest: <sup>1</sup>

(ii.) Land, unless a contrary intention appears, includes land of any tenure, and tenements and hereditaments, corporeal or incorporeal, and houses and other buildings, also an undivided share in land:

(iii.) In relation to land, income includes rents and profits, and possession includes receipt of income:

Manor.

(iv.) Manor includes lordship, and reputed manor or lordship.

Convey-  
ance.

(v.) Conveyance, unless a contrary intention appears, includes assignment, appointment, lease, settlement, and other assurance, and covenant to surrender, made by deed, on a sale, mortgage, demise, or settlement of any property, or on any other dealing with or for any property; and convey, unless a contrary intention appears, has a meaning corresponding with that of conveyance:

Mortgage.

(vi.) Mortgage includes any charge on any property for securing money or money's worth; and mortgage money means money, or money's worth, secured by a mortgage; and mortgagor includes any person from time to time deriving title under the original mortgagor, or entitled to redeem a mortgage, according to his estate, interest, or right, in the mortgaged property; and mortgagee includes any person from time to time deriving title under the original mortgagee; and mortgagee in possession is, for the purposes of this Act, a mortgagee who, in right of the mortgage, has entered into and is in possession of the mortgaged property:

Incum-  
brance.

(vii.) Incumbrance includes a mortgage in fee, or for a less estate, and a trust for securing money, and a lien, and a charge of a portion, annuity, or other capital or annual sum;

and incumbrancer has a meaning corresponding with that of incumbrance, and includes every person entitled to the benefit of an incumbrance, or to require payment or discharge thereof: 44 & 45  
Vict. c. 41,  
§ 2.

(viii.) Purchaser,<sup>2</sup> unless a contrary intention appears, includes a lessee or mortgagee, and an intending purchaser, lessee, or mortgagee, or other person, who, for valuable consideration, takes or deals for any property; and purchase, unless a contrary intention appears, has a meaning corresponding with that of purchaser; but sale means only a sale properly so called: Purchaser.

(ix.) Rent includes yearly or other rent, toll, duty, royalty, or other reservation, by the acre, the ton, or otherwise; and fine includes premium or fore-gift, and any payment, consideration, or benefit in the nature of a fine, premium, or fore-gift: Rent.

(x.) Building purposes include the erecting and the improving of, and the adding to, and the repairing of buildings; and a building lease is a lease for building purposes or purposes connected therewith: Building.

(xi.) A mining lease is a lease for mining purposes, that is, the searching for, winning, working, getting, making merchantable, carrying away, or disposing of mines and minerals, or purposes connected therewith, and includes a grant or licence for mining purposes: Mining  
Lease.

(xii.) Will includes codicil: Will.

(xiii.) Instrument includes deed, will, inclosure award, and Act of Parliament: Instrument.

(xiv.) Securities include stocks, funds, and shares: Securities.

(xv.) Bankruptcy includes liquidation by arrangement, and any other act or proceeding in law having, under any Act for the time being in force, effects or results similar to those of bankruptcy; and bankrupt has a meaning corresponding with that of bankruptcy: Bankruptcy.

(xvi.) Writing includes print; and words referring to any instrument, copy, extract, abstract, or other document include any such instrument, copy, extract, abstract, or other docu-

44 & 45  
Vict. c. 41,  
§ 2. ment being in writing or in print, or partly in writing and partly in print :

Person.  
The Court. (xvii.) Person includes a corporation :  
(xviii.) Her Majesty's High Court of Justice is referred to as the Court.

<sup>1</sup> The definition of "property" in the C. A., 1882, is as follows:—

"Property includes real and personal property and any debt, and any thing in action, and any right or interest in the nature of property, whether in possession or not."

<sup>2</sup> Compare the definition of "purchaser" in s. 1 (4), ii, of the C. A., 1882, which is as follows:—

"Purchaser includes a lessee or mortgagee, or an intending purchaser, lessee or mortgagee, or other person, who, for valuable consideration, takes or deals for property, and purchase has a meaning corresponding with that of purchaser."

## II.—SALES AND OTHER TRANSACTIONS.

### CONTRACTS FOR SALE.<sup>1</sup>

44 & 45  
Vict. c. 41,  
§ 3. 3.—(1.) Under a contract to sell and assign a term of years derived out of a leasehold interest in land, the intended assign shall not have the right to call for the title to the leasehold reversion.

Applica-  
tion of  
stated  
conditions  
of sale to  
all pur-  
chases.

(2.) Where land of copyhold or customary tenure has been converted into freehold by enfranchisement, then, under a contract to sell and convey the freehold, the purchaser shall not have the right to call for the title to make the enfranchisement.<sup>2</sup>

Produc-  
tion of  
deeds prior  
to com-  
mence-  
ment.

(3.) A purchaser of any property shall not require the production, or any abstract or copy, of any deed, will, or other document, dated or made before the time prescribed by law, or stipulated, for commencement of the title, even though the same creates a power subsequently exercised by

an instrument abstracted in the abstract furnished to the purchaser; nor shall he require any information, or make any requisition, objection, or inquiry, with respect to any such deed, will, or document, or the title prior to that time, notwithstanding that any such deed, will, or other document, or that prior title is recited, covenanted to be produced, or noticed; and he shall assume, unless the contrary appears, that the recitals, contained in the abstracted instruments, of any deed, will, or other document, forming part of that prior title, are correct, and give all the material contents of the deed, will, or other document so recited, and that every document so recited was duly executed by all necessary parties, and perfected, if and as required, by fine, recovery, acknowledgment, enrolment, or otherwise.

44 & 45  
Vict. c. 41  
**§ 3.**

(4.) Where land sold is held by lease (not including under-lease), the purchaser shall assume, unless the contrary appears, that the lease was duly granted; and, on production of the receipt for the last payment due for rent under the lease before the date of actual completion of the purchase, he shall assume, unless the contrary appears, that all the covenants and provisions of the lease have been duly performed and observed up to the date of actual completion of the purchase.

Effect of  
receipt of  
rent on  
sale of  
lease

(5.) Where land sold is held by under-lease, the purchaser shall assume, unless the contrary appears, that the under-lease and every superior lease were duly granted; and, on production of the receipt for the last payment due for rent under the under-lease before the date of actual completion of the purchase, he shall assume, unless the contrary appears, that all the covenants and provisions of the under-lease have been duly performed and observed up to the date of actual completion of the purchase, and further that all rent due under every superior lease, and all the covenants and provisions of every superior lease, have been paid and duly performed and observed up to that date.

On sale of  
under-  
lease.

(6.) On a sale of any property, the expenses of the production and inspection of all Acts of Parliament, inclosure

Expenses  
of produc-  
tion, &c.

44 & 45  
 Vict. c. 41,  
 § 3.  
 — — —

awards, records, proceedings of courts, court rolls, deeds, wills, probates, letters of administration, and other documents, not in the vendor's possession, and the expenses of all journeys incidental to such production or inspection, and the expenses of searching for, procuring, making, verifying, and producing all certificates, declarations, evidences, and information not in the vendor's possession, and all attested, stamped, office, or other copies or abstracts of, or extracts from, any Acts of Parliament or other documents aforesaid, not in the vendor's possession, if any such production, inspection, journey, search, procuring, making, or verifying is required by a purchaser, either for verification of the abstract, or for any other purpose, shall be borne by the purchaser who requires the same; and where the vendor retains possession of any document, the expenses of making any copy thereof, attested or unattested, which a purchaser requires to be delivered to him, shall be borne by that purchaser.

Single  
 abstract.

(7.) On a sale of any property in lots, a purchaser of two or more lots, held wholly or partly under the same title, shall not have a right to more than one abstract of the common title, except at his own expense.

How far  
 this section  
 applies.

(8.) This section applies only to titles and purchasers on sales properly so called, notwithstanding any interpretation in this Act.

(9.) This section applies only if and as far as a contrary intention is not expressed in the contract of sale, and shall have effect subject to the terms of the contract and to the provisions therein contained.

(10.) This section applies only to sales made after the commencement of this Act.

(11.) Nothing in this section shall be construed as binding a purchaser to complete his purchase in any case where, on a contract made independently of this section, and containing stipulations similar to the provisions of this section, or any of them, specific performance of the contract would not be enforced against him by the Court.

<sup>1</sup> For notes on this section, and s. 13 of this Act, see s. 2 of the V. & P. Act, 1874 (a), under the title "Rights under Open Contract" (b). 44 & 45  
Vict. c. 41,  
§ 3.

<sup>2</sup> As to the right of a copyholder to an acknowledgment of right to production of the muniments of the lord's title on an enfranchisement, see *Re Agg-Gardner* (c).

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CONVEYANCE BY VENDOR'S EXECUTOR.

4.—(1.) Where at the death of any person<sup>1</sup> there is subsisting a contract enforceable against his heir or devisee,<sup>2</sup> for the sale of the fee simple or other freehold interest, descendible to his heirs general,<sup>3</sup> in any land, his personal representatives shall, by virtue of this Act, have power to convey the land for all the estate and interest vested in him at his death, in any manner proper for giving effect to the contract.<sup>1</sup> 44 & 45  
Vict. c. 41,  
§ 4.  
Comple-  
tion of  
contract  
after  
death.

(2.) A conveyance made under this section shall not affect the beneficial rights of any person claiming under any testamentary disposition or as heir or next of kin of a testator or intestate.

(3.) This section applies only in cases of death after the commencement of this Act.

<sup>1</sup> Compare s. 30 of this Act, which takes the place of the repealed s. 5 of the V. & P. Act, 1874, and s. 48 of the Land Transfer Act, 1875. See also the notes on those sections (d) as to the necessity for this provision.

<sup>2</sup> It must be observed that the power conferred by this section can only be exercised where the testator or intestate has entered into a valid contract, binding upon his devisee or heir. If, therefore, there is any reasonable ground upon which the heir or devisee can dispute the validity of the contract, the legal personal representative cannot safely convey until the Court has decided the question.

<sup>3</sup> The section applies to a sale of a base fee, and an estate *pur autre vie*, but not of an estate tail.

(a) 37 & 38 Vict. c. 78.  
(b) P. 192, *ante*.

(c) 25 Ch. D. 600.  
(d) P. 201, *ante*.

## DISCHARGE OF INCUMBRANCES ON SALE.

44 & 45  
Vict. c. 41,  
§ 5.

Provision  
by Court  
for incum-  
brances,  
and sale  
freed  
therefrom.

5.—(1.) Where land subject to any incumbrance,<sup>1</sup> whether immediately payable or not, is sold by the Court, or out of Court, the Court may, if it thinks fit, on the application<sup>2</sup> of any party to the sale, direct or allow payment into Court, in case of an annual sum<sup>3</sup> charged on the land, or of a capital sum charged on a determinable interest in the land, of such amount as, when invested in Government securities, the Court considers will be sufficient, by means of the dividends thereof, to keep down or otherwise provide for that charge, and in any other case of capital money charged on the land, of the amount sufficient to meet the incumbrance and any interest due thereon; but in either case there shall also be paid into Court such additional amount as the Court considers will be sufficient to meet the contingency of further costs, expenses, and interest, and any other contingency, except depreciation of investments, not exceeding one-tenth part of the original amount to be paid in, unless the Court for special reason thinks fit to require a larger additional amount.

(2.) Thereupon, the Court may, if it thinks fit, and either after or without any notice to the incumbrancer,<sup>4</sup> as the Court thinks fit, declare the land to be freed from the incumbrance,<sup>5</sup> and make any order for conveyance, or vesting order, proper for giving effect to the sale, and give directions for the retention and investment of the money in Court.

(3.) After notice served on the persons interested in or entitled to the money or fund in Court, the Court may direct payment or transfer thereof to the persons entitled to receive or give a discharge for the same, and generally may give directions respecting the application or distribution of the capital or income thereof.

(4.) This section applies to sales not completed at the commencement of this Act, and to sales thereafter made.

44 & 45  
Vict. c. 41,  
§ 5.

<sup>1</sup> See the definition of "incumbrance" in s. 2 (vii), *ante*, p. 210.

<sup>2</sup> This application must be made by summons in the Chancery Division, to be served on such persons, if any, as the Court thinks fit; and the Court has full power to make such order as it thinks fit respecting the costs (*d*). Applica-  
tion by  
summons.

<sup>3</sup> Accordingly, the Court will not, upon the further consideration of an administration action, order real estate to be sold free from an annuity, but will leave the matter to be dealt with on summons in chambers (*e*).

<sup>4</sup> Although the power of acting without notice to the incumbrancer will be very beneficial in cases where it is impossible or extremely difficult to serve him, it is probable that the Court will require notice to him whenever it can be promptly and easily given, and will, in the rare cases where notice is dispensed with, require very strict proof of the amount due to him. Notice to  
incum-  
brancers.

<sup>5</sup> Hitherto, the Court, in ordering a sale of real estate, has directed it to take place subject to the claims of such incumbrancers as did not consent to the sale. This section enables a sale under an order of the Court to be made free from the claims of incumbrancers, whether they consent or not.

But an order for the sale of land free from an incumbrance, the incumbrancer not being a party to the action, should follow the words of the statute (which are to be interpreted strictly), and, after directing payment into Court of the purchase money, and setting apart a sufficient amount to meet the claims of the incumbrancer, proceed to declare that thereupon any person interested may be at liberty to apply in chambers for a declaration that the land is freed from the incumbrance (*f*). Form of  
order.

This section is permissive, and does not enable a purchaser to compel a vendor to apply for an order declaring land to be free from an incumbrance which he would not, before this Act, have been compelled to pay off. A plot of land was sold by a railway company for £868, subject to condition for rescission if the purchaser should insist upon any objection which the company should decline to remove. It was subsequently discovered that the land was subject to a rentcharge of £63, and, on a summons by the purchaser, PEARSON, J., held that he could not compel the company to apply to the Court under this section (*g*).

(*d*) See s. 69, *post*, p. 320.

(*e*) *Patching v. Bull*, 30 W. R. 244.

(*f*) *Dickin v. Dickin*, 30 W. R. 887.

(*g*) *Re G. N. R. Co. & Sanderson*,  
25 Ch. D. 788.



## GENERAL WORDS.

44 & 45  
Vict. c. 41,  
§ 6.

General  
words in  
convey-  
ances of  
land.

**6.**—(1.) A conveyance of land shall be deemed to include and shall by virtue of this Act operate to convey, with the land, all buildings, erections, fixtures, commons, hedges, ditches, fences, ways, waters, watercourses, liberties, privileges, easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land, or any part thereof, or at the time of conveyance<sup>1</sup> demised, occupied, or enjoyed with, or reputed or known as part or parcel of or appurtenant to the land or any part thereof.

On con-  
veyances of  
buildings.

(2.) A conveyance of land, having houses or other buildings thereon, shall be deemed to include and shall by virtue of this Act operate to convey, with the land, houses, or other buildings, all outhouses, erections, fixtures, cellars, areas, courts, courtyards, cisterns, sewers, gutters, drains, ways, passages, lights, watercourses, liberties, privileges, easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land, houses, or other buildings conveyed or any of them, or any part thereof, or at the time of conveyance<sup>1</sup> demised, occupied, or enjoyed with, or reputed or known as part or parcel of or appurtenant to, the land, houses, or other buildings conveyed, or any of them, or any part thereof.

On con-  
veyance of  
manor.

(3.) A conveyance of a manor shall be deemed to include and shall by virtue of this Act operate to convey, with the manor, all pastures, feedings, wastes, warrens, commons, mines, minerals, quarries, furzes, trees, woods, underwoods, coppices, and the ground and soil thereof, fishings, fisheries, fowlings, courts leet, courts baron, and other courts, view of frankpledge and all that to view of frankpledge doth belong, mills, mulctures, customs, tolls, duties, reliefs, heriots, fines, sums of money, amerciaments, waifs, estrays, chief-rents, quit-rents, rents charge, rents seck, rents of assize, fee farm rents, services, royalties, jurisdictions, franchises, liberties, privileges,

easements, profits, advantages, rights, emoluments, and hereditaments whatsoever, to the manor appertaining or reputed to appertain, or at the time of conveyance demised, occupied, or enjoyed with the same, or reputed or known as part, parcel, or member thereof.

44 & 45  
Vict. c. 41,  
§ 6.

(4.) This section applies only if and as far as a contrary intention is not expressed in the conveyance, and shall have effect subject to the terms of the conveyance and to the provisions therein contained.<sup>2</sup>

Section  
may be  
excluded.

(5.) This section shall not be construed as giving to any person a better title to any property, right, or thing in this section mentioned than the title which the conveyance gives to him to the land or manor expressed to be conveyed, or as conveying to him any property, right, or thing in this section mentioned, further or otherwise than as the same could have been conveyed to him by the conveying parties.<sup>3</sup>

(6.) This section applies only to conveyances made after the commencement of this Act.<sup>4</sup>

<sup>1</sup> This section has the same effect as if the general words specified therein were copied into the conveyance. The usual general words may, therefore, be safely omitted in reliance upon this provision in ordinary cases; but where it is desired to revive an easement which has become extinguished by unity of possession, and which is not *at the time of conveyance* enjoyed with the property conveyed, it will still be prudent to insert the words "Together with all rights, easements, and appurtenances with the premises at any time heretofore exercised or enjoyed" (g).

<sup>2</sup> If any easements or appurtenances are intended not to pass to the purchaser, care must, of course, be taken specially to reserve them to the vendor.

<sup>3</sup> In other words, the purchaser will get the same title to all easements and appurtenances as to the land.

<sup>4</sup> The commencement of the Act is 31st December, 1881

(g) *Barlow v. Rhodes*, 1 Cr. & M. 448.

## COVENANTS FOR TITLE.

44 & 45  
Vict. c. 41,  
§ 7.

Covenants  
for title  
to be  
implied.

On con-  
veyance  
for value,  
by bene-  
ficial  
owner.  
Right to  
convey.

Quiet en-  
joyment.

7.—(1.) In a conveyance<sup>1</sup> there shall, in the several cases in this section mentioned, be deemed to be included, and there shall in those several cases, by virtue of this Act, be implied,<sup>2</sup> a covenant to the effect in this section stated, by the person<sup>3</sup> or by each person who conveys, as far as regards the subject-matter or share of subject-matter expressed to be conveyed by him, with the person,<sup>3</sup> if one, to whom the conveyance is made, or with the persons jointly, if more than one, to whom the conveyance is made as joint tenants, or with each of the persons, if more than one, to whom the conveyance is made as tenants in common, that is to say :

(A.) In a conveyance<sup>4</sup> for valuable consideration<sup>5</sup> other than a mortgage, the following covenant by a person who conveys and is expressed to convey<sup>4</sup> as beneficial owner (namely) :

That, notwithstanding anything by the person who so conveys, or any one through whom he derives title, otherwise than by purchase for value,<sup>7</sup> made, done, executed, or omitted, or knowingly suffered, the person who so conveys, has, with the concurrence of every other person, if any, conveying by his direction, full power to convey the subject-matter expressed to be conveyed, subject as, if so expressed, and in the manner in which, it is expressed to be conveyed, and that, notwithstanding anything as aforesaid, that subject-matter shall remain to and be quietly entered upon, received, and held, occupied, enjoyed, and taken, by the person to whom the conveyance is expressed to be made, and any person deriving title under him, and the benefit thereof shall be received and taken accordingly, without any lawful interruption or disturbance by the person who so conveys or any person conveying by his direction, or rightfully claiming or to claim by, through,

under, or in trust for the person who so conveys, or any person conveying by his direction, or by, through, or under any one not being a person claiming in respect of an estate or interest subject whereto the conveyance is expressly made, through whom the person who so conveys derives title, otherwise than by purchase for value; and that, freed and discharged from, or otherwise by the person who so conveys sufficiently indemnified against, all such estates, incumbrances, claims, and demands other than those subject to which the conveyance is expressly made, as either before or after the date of the conveyance have been or shall be made, occasioned, or suffered by that person or by any person conveying by his direction, or by any person rightfully claiming by, through, under, or in trust for the person who so conveys, or by, through, or under any person conveying by his direction, or by, through, or under any one through whom the person who so conveys derives title, otherwise than by purchase for value; and further, that the person who so conveys, and any person conveying by his direction, and every other person having or rightfully claiming any estate or interest in the subject-matter of conveyance, other than an estate or interest subject whereto the conveyance is expressly made, by, through, under, or in trust for the person who so conveys, or by, through, or under any person conveying by his direction, or by, through, or under any one through whom the person who so conveys derives title, otherwise than by purchase for value, will, from time to time and at all times after the date of the conveyance, on the request and at the cost of any person to whom the conveyance is expressed to be made, or of any person deriving title under him, execute and do all such lawful assurances and things for further or more perfectly assuring the subject-matter of the conveyance to the person to whom the conveyance is made,

<sup>44 & 45</sup>  
 Vict. c. 41,  
**§ 7.**

Freedom  
 from  
 incum-  
 brance.

Further  
 assurance.

44 & 45  
Vict. c. 41,  
§ 7.

and to those deriving title under him, subject as, if so expressed, and in the manner in which the conveyance is expressed to be made, as by him or them or any of them shall be reasonably required:

(in which covenant a purchase for value shall not be deemed to include a conveyance in consideration of marriage).<sup>6</sup>

On convey-  
ance of  
leaseholds  
for value,  
by bene-  
ficial  
owner.

(B.) In a conveyance of a leasehold property<sup>8</sup> for valuable consideration, other than a mortgage, the following further covenant by a person who conveys and is expressed to convey as beneficial owner (namely):

That, notwithstanding anything by the person who so conveys, or any one through whom he derives title otherwise than by purchase for value, made, done, executed, or omitted, or knowingly suffered, the lease or grant creating the term or estate for which the land is conveyed is, at the time of conveyance, a good, valid, and effectual lease or grant of the property conveyed, and is in full force, unforfeited, unsurrendered, and in nowise become void or voidable, and that, notwithstanding anything as aforesaid, all the rents reserved by, and all the covenants, conditions, and agreements contained in the lease or grant, and on the part of the lessee or grantee and the persons deriving title under him to be paid, observed, and performed, have been paid, observed, and performed up to the time of conveyance:

Validity of  
lease.

(in which covenant a purchase for value shall not be deemed to include a conveyance in consideration of marriage)<sup>6</sup>:

On mort-  
gage, by  
beneficial  
owner.

(C.) In a conveyance by way of mortgage, the following covenant by a person who conveys and is expressed to convey as beneficial owner (namely):

Right to  
convey.  
Quiet en-  
joyment.

That the person who so conveys, has, with the concurrence of every other person, if any, conveying by his direction, full power to convey the subject-matter expressed to be conveyed by him, subject as, if so expressed, and in the manner in which it is expressed to be conveyed; and also that, if default is made in payment of the

money intended to be secured by the conveyance, or any interest thereon, or any part of that money or interest, contrary to any provision in the conveyance, it shall be lawful for the person to whom the conveyance is expressed to be made, and the persons deriving title under him, to enter into and upon, or receive, and thenceforth quietly hold, occupy, and enjoy or take and have, the subject-matter expressed to be conveyed, or any part thereof, without any lawful interruption or disturbance by the person who so conveys, or any person conveying by his direction, or any other person not being a person claiming in respect of an estate or interest subject whereto the conveyance is expressly made; and that, freed and discharged from, or otherwise by the person who so conveys sufficiently indemnified against, all estates, incumbrances, claims, and demands whatever, other than those subject whereto the conveyance is expressly made; and further, that the person who so conveys and every person conveying by his direction, and every person deriving title under any of them, and every other person having or rightfully claiming any estate or interest in the subject-matter of conveyance, or any part thereof, other than an estate or interest subject whereto the conveyance is expressly made, will from time to time and at all times, on the request of any person to whom the conveyance is expressed to be made, or of any person deriving title under him, but, as long as any right of redemption exists under the conveyance, at the cost of the person so conveying, or of those deriving title under him, and afterwards at the cost of the person making the request, execute and do all such lawful assurances and things for further or more perfectly assuring the subject-matter of conveyance and every part thereof to the person to whom the conveyance is made, and to those deriving title under him, subject as, if so expressed, and in the manner in which

44 & 45  
 Vict. c. 41,  
§ 7.

Freedom  
 from  
 incum-  
 brance.

Further  
 assurance.

44 & 45  
Vict. c. 41,  
§ 7.

On mort-  
gage of  
leaseholds,  
by bene-  
ficial  
owner.  
Validity of  
lease.

the conveyance is expressed to be made, as by him or them or any of them shall be reasonably required.

(D.) In a conveyance by way of mortgage of leasehold property, the following further covenant by a person who conveys and is expressed to convey as beneficial owner (namely):

That the lease or grant creating the term or estate for which the land is held is, at the time of conveyance, a good, valid, and effectual lease or grant of the land conveyed and is in full force, unforfeited, and unsurrendered and in nowise become void or voidable, and that all the rents reserved by, and all the covenants, conditions, and agreements contained in, the lease or grant, and on the part of the lessee or grantee and the persons deriving title under him to be paid, observed, and performed, have been paid, observed, and performed up to the time of conveyance: and also that the person so conveying, or the persons deriving title under him, will at all times, as long as any money remains on the security of the conveyance, pay, observe, and perform, or cause to be paid, observed, and performed all the rents reserved by, and all the covenants, conditions, and agreements, contained in, the lease or grant, and on the part of the lessee or grantee and the persons deriving title under him to be paid, observed, and performed, and will keep the person to whom the conveyance is made, and those deriving title under him, indemnified against all actions, proceedings, costs, charges, damages, claims, and demands, if any, to be incurred or sustained by him or them by reason of the non-payment of such rent or the non-observance or non-performance of such covenants, conditions, and agreements, or any of them.

Payment  
of rent and  
perform-  
ance of  
covenants.

On settle-  
ment.

(E.) In a conveyance by way of settlement<sup>6</sup>, the following covenant by a person who conveys and is expressed to convey as settlor (namely):

That the person so conveying, and every person deriving title under him by deed or act or operation of law in his lifetime subsequent to that conveyance, or by testamentary disposition or devolution in law, on his death, will, from time to time, and at all times, after the date of that conveyance, at the request and cost of any person deriving title thereunder, execute and do all such lawful assurances and things for further or more perfectly assuring the subject-matter of the conveyance to the persons to whom the conveyance is made and those deriving title under them, subject as, if so expressed, and in the manner in which the conveyance is expressed to be made, as by them or any of them shall be reasonably required.

44 & 45  
Vict. c. 41,  
§ 7.

For further  
assurance,  
limited.

(F.) In any conveyance, the following covenant by every person who conveys and is expressed to convey as trustee<sup>9</sup> or mortgagee, or as personal representative of a deceased person, or as committee of a lunatic so found by inquisition, or under an order of the Court, which covenant shall be deemed to extend to every such person's own acts only (namely):

On con-  
veyance by  
trustee,  
mortgagee,  
&c.

That the person so conveying has not executed or done, or knowingly suffered, or been party or privy to, any deed or thing, whereby or by means whereof the subject-matter of the conveyance, or any part thereof, is or may be impeached, charged, affected, or incumbered in title, estate, or otherwise, or whereby or by means whereof the person who so conveys is in anywise hindered from conveying the subject-matter of the conveyance, or any part thereof, in the manner in which it is expressed to be conveyed.

Against  
incum-  
brance s.

(2.) Where in a conveyance it is expressed that by direction of a person expressed to direct as beneficial owner another person conveys, then, within this section, the person giving the direction, whether he conveys and is expressed to convey as beneficial owner or not, shall be deemed to convey and to be expressed to convey as beneficial owner the subject-matter

Convey-  
ance by  
direction  
of bene-  
ficial  
owner.



**44 & 45  
Vict. c. 41,  
§ 7.** so conveyed by his direction; and a covenant on his part shall be implied accordingly.

**Convey-  
ance by  
husband  
and wife.**

(3.) Where a wife conveys and is expressed to convey as beneficial owner, and the husband also conveys<sup>10</sup> and is expressed to convey as beneficial owner, then, within this section, the wife shall be deemed to convey and to be expressed to convey by direction of the husband, as beneficial owner; and, in addition to the covenant implied on the part of the wife, there shall also be implied, first, a covenant on the part of the husband as the person giving that direction, and secondly, a covenant on the part of the husband in the same terms as the covenant implied on the part of the wife.

**When no  
covenants  
implied.**

(4.) Where in a conveyance a person conveying is not expressed<sup>11</sup> to convey as beneficial owner, or as settlor, or as trustee, or as mortgagee, or as personal representative of a deceased person, or as committee of a lunatic so found by inquisition, or under an order of the Court, or by direction of a person as beneficial owner, no covenant on the part of the person conveying shall be, by virtue of this section, implied in the conveyance.

**Convey-  
ance in-  
cludes  
covenant  
to sur-  
render.**

(5.) In this section a conveyance includes a deed conferring the right to admittance to copyhold or customary land, but does not include a demise by way of lease at a rent, or any customary assurance, other than a deed, conferring the right to admittance to copyhold or customary land.

**Covenants  
to run  
with land.**

(6.) The benefit of a covenant implied as aforesaid shall be annexed and incident to, and shall go with, the estate or interest of the implied covenantee, and shall be capable of being enforced by every person in whom that estate or interest is, for the whole or any part thereof, from time to time vested.

**Section  
may be  
excluded  
or varied.**

(7.) A covenant implied as aforesaid may be varied or extended by deed, and, as so varied or extended, shall, as far as may be, operate in the like manner, and with all the like incidents, effects, and consequences, as if such variations or extensions were directed in this section to be implied.

(8.) This section applies only to conveyances made after the commencement of this Act.

44 & 45  
Vict. c. 41,  
§ 7.

<sup>1</sup> This is not the first legislative attempt to incorporate covenants in assurances by implication. In conveyances, under s. 132 of the Lands Clauses Consolidation Act, 1845, the word "grant" implies specified covenants for title. And by the Act to Facilitate the Conveyance of Real Property (*h*), which is repealed by this Act, it was, in effect, provided that certain short specified forms of covenant in deeds expressed to be made in pursuance of that Act should have the same effect as if the ordinary covenants then in general use had been inserted in the deed in the form specified in a schedule to the Act. That Act, however, applied only to the usual covenants for title, for production of deeds and against incumbrances, and to a release of all claims upon the land conveyed.

Implied  
covenants  
under  
earlier  
Acts.

These shortened forms of covenant were never extensively used, even in the conveyances to which alone they were applicable. In order to imply the full covenants it was necessary to express the deed to be made in pursuance of the Act, and to insert the exact words of the shortened covenants. This required quite as much care and labour as the insertion of the common forms of covenant, while the slight reduction in the length of the draft effected a corresponding reduction in the draftsman's remuneration.

<sup>2</sup> On the other hand, the forms of covenant set out in s. 7 of the Conveyancing Act, 1881, are sufficiently varied to be applicable to nearly every form of assurance. They are implied by the introduction of two or three simple words in the *testatum*, without any express words of covenant. They materially economise words and space, and the provisions of the Solicitors' Remuneration Act, 1881, ensure a fair remuneration for the draftsman, irrespective of the length of the draft.

Implied  
covenants  
under  
C. A. 1881.

In the writer's opinion, the provisions of s. 7 may be safely adopted in all ordinary assurances, subject to the points mentioned in the following notes.

<sup>3</sup> See s. 64 (*i*), which is as follows:—

"In the construction of a covenant or proviso, or other provision implied in a deed by virtue of this Act, words importing the singular or plural number, or the masculine gender, shall be read as also importing the plural or singular number, or as extending to females, as the case may require."

The case of several covenantees is also provided for by s. 60 (*k*),

(*h*) 8 & 9 Vict. c. 119.

(*i*) Page 314, *post*.

(*k*) Page 312, *post*.

**44 & 45** which is expressly extended to a covenant implied by virtue of this Act,  
**Vict. c. 41,** if and so far as a contrary intention is not expressed in the covenant,  
**§ 7.** and which takes effect subject to the covenant and to the provisions therein contained.

**Covenants bind heirs,** The words "for himself, his heirs, executors, and administrators," are rendered unnecessary by s. 59 (*l*), which, in effect, provides that a covenant shall bind the heirs and real estate, as well as the executors and administrators and personal estate, of the person making the same, and which extends to a covenant implied by virtue of this Act, if and as far as a contrary intention is not expressed in the covenant.

It must be remembered, however, that ss. 59 and 60 apply only to covenants, &c., made or implied after 31st December, 1881.

The covenant will enure for the benefit of the real or personal representatives of the covenantee, under s. 58 (*m*), which, in effect, provides that a covenant made after 31st December, 1881, relating to land of inheritance, or devolving on the heir as special occupant, shall be deemed to be made with the covenantee, his heirs and assigns, and that a covenant relating to other land shall be deemed to be made with the covenantee, his executors, administrators and assigns.

**and run with land.** The benefit of covenants implied by this section will also run with the land, by virtue of sub-s. 6 of s. 7 (*n*).

<sup>4</sup> See the definition of "conveyance" and "convey" in s. 2 (5), p. 210, *ante*.

**Covenants not implied in voluntary conveyances.** <sup>5</sup> It must be noted that covenants for title by a person expressed to convey or assign "as beneficial owner" are only implied in a conveyance or assignment for valuable consideration. Therefore, in a voluntary conveyance or assignment, no covenants can be implied, and if any are required they must be inserted in the draft. An assignment of leaseholds is not voluntary, although no consideration is expressed, if the assignee becomes liable to pay rent and perform covenants (*o*).

<sup>6</sup> But a marriage settlement is not a conveyance for valuable consideration within this section, and therefore any covenants that may be desirable other than one for further assurance must be expressly inserted.

<sup>7</sup> The words, "or anyone through whom he derives title otherwise than by purchase for value," had, before the passing of this Act, been extensively adopted instead of the old form, "his ancestors or testators." Their effect is to include the acts and omissions not only of a testator or intestate, but also of any other voluntary grantor through whom the vendor may claim since the last conveyance for value.

<sup>8</sup> It will be observed that no covenant by the assignee of leaseholds to

(*l*) Page 311, *post*.

(*m*) Page 310, *post*.

(*n*) Page 226, *ante*.

(*o*) *Price v. Jenkins*, 5 Ch. D. 619,

and *Hamilton v. Molloy*, L. R. 5 Ir. 339. But see *Ex parte Hillman*, 10 Ch. D. 622, and *Ridler v. Ridler*, 22 Ch. D. 74.

pay rent and perform covenants is implied. The usual covenant to that effect must, therefore, still be inserted.

44 & 45  
Vict. c. 41,  
**§ 7.**

<sup>9</sup> No covenant against incumbrances is implied in a declaration vesting trust property in new trustees under s. 34. See notes to that section (*p*).

<sup>10</sup> In a conveyance by a woman married after 31st December, 1881, or by a woman previously married, of property devolving upon her after that date, the concurrence of her husband will be unnecessary. See ss. 1, 2, and 5 of the M. W. P. A., 1882 (*q*).

<sup>11</sup> In all cases where it is desired to take advantage of s. 7 to imply covenants, care must be taken to express the character in which the intended implied covenantor conveys. This is most properly done in the *testatum*; but an express statement in any part of the deed, to the effect that a specified person *conveys or assigns* in a particular capacity, appears to be sufficient. A recital that he *is entitled* in any particular capacity is not sufficient.

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EXECUTION OF PURCHASE DEED.

**8.**—(1.) On a sale, the purchaser shall not be entitled to require that the conveyance to him be executed in his presence, or in that of his solicitor, as such; but shall be entitled to have, at his own cost, the execution of the conveyance attested by some person appointed by him, who may, if he thinks fit, be his solicitor.

44 & 45  
Vict. c. 41,  
**§ 8.**  
Rights of  
purchaser  
as to  
execution.

(2.) This section applies only to sales made after the commencement of this Act.<sup>1</sup>

<sup>1</sup> See notes to s. 56, p. 310, *post*.

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PRODUCTION AND SAFE CUSTODY OF TITLE DEEDS.

**9.**—(1.) Where a person retains possession of documents, and gives to another an acknowledgment in writing of the right of that other to production of those documents, and to delivery of copies thereof (in this section called an acknow-

44 & 45  
Vict. c. 41,  
**§ 9.**  
Acknow-  
ledgment

(*p*) Page 279, *post*.

358, 360, *post*.

(*q*) 45 & 46 Vict. c. 75, pp 353,

41 & 45  
Vict. c. 41,  
§ 9.

of right to  
produc-  
tion, and  
under-  
taking for  
safe  
custody of  
docu-  
ments.

ledgment), that acknowledgment shall have effect as in this section provided.

(2.) An acknowledgment shall bind the documents to which it relates in the possession or under the control of the person who retains them, and in the possession or under the control of every other person having possession or control thereof from time to time, but shall bind each individual possessor or person as long only as he has possession or control thereof; and every person so having possession or control from time to time shall be bound specifically to perform the obligations imposed under this section by an acknowledgment, unless prevented from so doing by fire or other inevitable accident.

(3.) The obligations imposed under this section by an acknowledgment are to be performed from time to time at the request in writing of the person to whom an acknowledgment is given, or of any person, not being a lessee at a rent, having or claiming any estate, interest, or right through or under that person, or otherwise becoming through or under that person interested in or affected by the terms of any document to which the acknowledgment relates.

Obliga-  
tions im-  
posed by  
acknow-  
ledgment,

(4.) The obligations imposed under this section by an acknowledgment are—

- (i.) An obligation to produce the documents or any of them at all reasonable times for the purpose of inspection, and of comparison with abstracts or copies thereof, by the person entitled to request production or by any one by him authorised in writing; and
- (ii.) An obligation to produce the documents or any of them at any trial, hearing, or examination in any court, or in the execution of any commission, or elsewhere in the United Kingdom, on any occasion on which production may properly be required, for proving or supporting the title or claim of the person entitled to request production, or for any other purpose relative to that title or claim; and
- (iii.) An obligation to deliver to the person entitled to

request the same true copies or extracts, attested or unattested, of or from the documents or any of them.

<sup>44 & 45  
Vict. c. 41,</sup>  
**§ 9.**

(5.) All costs and expenses of or incidental to the specific performance of any obligation imposed under this section by an acknowledgment shall be paid by the person requesting performance.

<sup>Costs of  
produc-  
tion, &c.</sup>

(6.) An acknowledgment shall not confer any right to damages for loss or destruction of, or injury to, the documents to which it relates, from whatever cause arising.

(7.) Any person claiming to be entitled to the benefit of an acknowledgment may apply to the Court<sup>4</sup> for an order directing the production of the documents to which it relates, or any of them, or the delivery of copies of or extracts from those documents or any of them to him, or some person on his behalf; and the Court may, if it thinks fit, order production, or production and delivery, accordingly, and may give directions respecting the time, place, terms, and mode of production or delivery, and may make such order as it thinks fit respecting the costs of the application, or any other matter connected with the application.

<sup>Court may  
compel  
produc-  
tion.</sup>

(8.) An acknowledgment shall by virtue of this Act satisfy any liability to give a covenant for production and delivery of copies of or extracts from documents.<sup>1</sup>

<sup>Acknow-  
ledgment  
supersedes  
covenant  
for pro-  
duction.</sup>

(9.) Where a person retains possession of documents and gives to another an undertaking in writing for safe custody thereof, that undertaking shall impose on the person giving it, and on every person having possession or control of the documents from time to time, but on each individual possessor or person as long only as he has possession or control thereof,<sup>3</sup> an obligation to keep the documents safe, whole, uncanceled, and undefaced, unless prevented from so doing by fire or other inevitable accident.

<sup>Effect of  
under-  
taking for  
safe  
custody.</sup>

(10.) Any person claiming to be entitled to the benefit of such an undertaking may apply to the Court<sup>4</sup> to assess damages for any loss, destruction of, or injury to the documents or any of them, and the Court may, if it thinks fit,

<sup>Court  
may give  
damages  
for loss of  
deeds.</sup>

44 & 45  
 Vict. c. 41,  
 § 9.

direct an inquiry respecting the amount of damages, and order payment thereof by the person liable, and may make such order as it thinks fit respecting the costs of the application, or any other matter connected with the application.

Under-  
 taking  
 supersedes  
 covenant  
 for safe  
 custody.

(11.) An undertaking for safe custody of documents shall by virtue of this Act satisfy any liability to give a covenant for safe custody of documents.<sup>2</sup>

(12.) The rights conferred by an acknowledgment or an undertaking under this section shall be in addition to all such other rights relative to the production, or inspection, or the obtaining of copies of documents as are not, by virtue of this Act, satisfied by the giving of the acknowledgment or undertaking, and shall have effect subject to the terms of the acknowledgment or undertaking, and to any provisions therein contained.

Section  
 may be  
 excluded.

(13.) This section applies only if and as far as a contrary intention is not expressed in the acknowledgment or undertaking.

Not retro-  
 spective.

(14.) This section applies only to an acknowledgment or undertaking given, or a liability respecting documents incurred, after the commencement of this Act.

Acknow-  
 ledgment.

<sup>1</sup> A vendor may, at his option, give a covenant for production or an acknowledgment under this section. Such an acknowledgment, unlike the ordinary covenant for production, binds the person giving it so long only as he has possession of the deeds, and confers no right to damages in the event of their loss. It may, therefore, be safely given by trustees and mortgagees instead of the limited covenant hitherto given.

Under-  
 taking.

<sup>2</sup> A vendor who is beneficially interested may also give at his option either an undertaking for safe custody or the usual covenant to keep the deeds safe, whole and uncanceled. Such an undertaking, unlike an acknowledgment, renders the person who gives it liable to pay damages to any person entitled to the benefit of the undertaking in the event of the loss or destruction of the deeds; and it has, therefore, become the more usual practice for trustees and mortgagees not to give such an undertaking. In a recent case it was held that trustees for the lord of a manor could not be compelled to give an undertaking for safe custody; but the decision appears to have been based on the ground

that under s. 3 (2, 3) the purchaser had no right to require production of the deeds relating to the lord's title (*q*). 44 & 45  
Vict. c. 41,  
**§ 9.**

<sup>3</sup> The liability attaches only in the event of the loss or destruction of the deeds (otherwise than by fire or other inevitable accident) while in his possession. It is, therefore, less onerous than the usual covenant for safe custody. Liability  
for loss.

<sup>4</sup> By summons in the Chancery Division, to be served on such person as the Court shall direct (*r*).

See notes on s. 2 (3 and 4) of the Vendor and Purchaser Act 1874 (*s*).

Inasmuch as the acknowledgment and undertaking mentioned in this section are (at the option of the vendor) substituted for the covenant for production which he would otherwise be compelled to give, it would appear that r. 4 of s. 2 of the V. & P. Act, 1874 (*t*), as to the expense of covenants for production, will apply to them.

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### III.—LEASES.

#### RENT, ETC., TO GO WITH REVERSION.

**10.** (1.) Rent reserved by a lease, and the benefit of every covenant or provision therein contained, having reference to the subject-matter thereof, and on the lessee's part to be observed or performed, and every condition of re-entry and other condition therein contained, shall be annexed and incident to and shall go with the reversionary estate in the land, or in any part thereof, immediately expectant on the term granted by the lease, notwithstanding severance of that reversionary estate, and shall be capable of being recovered received, enforced, and taken advantage of by the person from time to time entitled, subject to the term, to the income of the whole or any part, as the case may require, of the land leased. 44 & 45  
Vict. c. 41,  
**§ 10.**  
Rent and  
benefit of  
lessee's  
covenants  
to run  
with re-  
version.

(*q*) *Re Agg-Gardner*, 25 Ch. D. 600.

(*r*) Sect. 61 p. 320, *post*.

(*s*) 37 & 38 Vict. c. 78, p. 195, *ante*.

(*t*) Page 196, *ante*.



44 & 45  
Vict. c. 41,  
**§ 10.**

(2.) This section applies only to leases made after the commencement of this Act.<sup>1</sup>

<sup>1</sup> Covenants by lessees in leases dated prior to 1st January, 1882, are governed by s. 9 of the Act to amend the law of Real Property (u), which is as follows :—

8 & 9 Vict.  
c. 106,  
**§ 9.**

Law be-  
fore 1882.

[9. That when the reversion expectant on a lease, made either before or after the passing of this act, of any tenements or hereditaments, of any tenure, shall after the said first day of October, one thousand eight hundred and forty-five,<sup>1</sup> be surrendered or merge, the estate which shall, for the time being confer as against the tenant under the same lease the next vested right to the same tenements or hereditaments shall to the extent and for the purpose of preserving such incidents to, and obligations on, the same reversion, as, but for the surrender or merger thereof, would have subsisted, be deemed the reversion expectant on the same lease.]

Compare ss. 58, 59, and 60, pp. 310—312, *post*.

<sup>1</sup> Previously, on the merger of an underlease, the covenants therein were extinguished, except so far as they might be covenants in gross (x).

#### LESSOR'S OBLIGATIONS GO WITH REVERSION.

44 & 45  
Vict. c. 41,  
**§ 11.**

Obligation  
of lessor's  
covenants  
to run  
with re-  
version.

**11.**—(1.) The obligation of a covenant entered into by a lessor with reference to the subject-matter of the lease shall, if and as far as the lessor has power to bind the reversionary estate immediately expectant on the term granted by the lease, be annexed and incident to and shall go with that reversionary estate, or the several parts thereof, notwithstanding severance of that reversionary estate, and may be taken advantage of and enforced by the person in whom the

(u) 8 & 9 Vict. c. 106.

(x) *Webb v. Russell*, 3 T. R. 393;

*Stokes v. Russell*, 3 T. R. 678. See also *Burton v. Barclay*, 7 Bing. 745.

term is from time to time vested by conveyance, devolution in law, or otherwise; and, if and as far as the lessor has power to bind the person from time to time entitled to that reversionary estate, the obligation aforesaid may be taken advantage of and enforced against any person so entitled.<sup>1</sup>

44 & 45  
Vict. c. 41,  
**§ 11.**

(2.) This section applies only to leases made after the commencement of this Act.

Not retro-  
spective.

<sup>1</sup> See and compare ss. 58, 59, and 60 (y), which relate to covenants generally.

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CONDITIONS APPORTIONED ON SEVERANCE.

**12.**—(1.) Notwithstanding the severance by conveyance, surrender, or otherwise, of the reversionary estate in any land comprised in a lease, and notwithstanding the avoidance or cesser in any other manner of the term granted by a lease as to part only of the land comprised therein, every condition or right of re-entry, and every other condition, contained in the lease, shall be apportioned, and shall remain annexed to the severed parts of the reversionary estate as severed, and shall be in force with respect to the term whereon each severed part is reversionary, or the term in any land which has not been surrendered, or as to which the term has not been avoided or has not otherwise ceased, in like manner as if the land comprised in each severed part, or the land as to which the term remains subsisting, as the case may be, had alone originally been comprised in the lease.

44 & 45  
Vict. c. 41,  
**§ 12.**

Apportion-  
ment of  
conditions  
on sever-  
ance, &c.

(2.) This section applies only to leases made after the commencement of this Act.<sup>1</sup>

Not retro-  
spective.

<sup>1</sup> Even under leases made before 1st January, 1882, conditions and powers of re-entry for non-payment of rent can be taken advantage of by certain assignees of severed portions of the reversion by virtue of s. 3 of Lord St. Leonards' Act, 1859 (z), which is as follows :—

44 & 45  
Vict. c. 41,  
§ 12.

22 & 23  
Vict. c. 35,  
§ 3.

Appor-  
tionment  
of con-  
ditions  
under  
Ld. St.  
Leonards'  
Act.

[3. Where the reversion upon a lease is severed, and the rent or other reservation is legally apportioned, the assignee of each part of the reversion shall, in respect of the apportioned rent or other reservation allotted or belonging to him, have and be entitled to the benefit of all conditions or powers of re-entry for non-payment of the original rent or other reservation, in like manner as if such conditions or powers had been reserved to him as incident to his part of the reversion in respect of the apportioned rent or other reservation allotted or belonging to him.]

Although not formally repealed, this enactment is practically superseded as to leases dated after 31st December, 1881, by s. 12 of the C. A., 1881. It should be observed that the earlier provision is limited to a condition or proviso for non-payment of rent, and applies only where the rent has been legally apportioned. No such restrictions are contained in the new enactment.

#### TITLE ON SUB-DEMISE.

44 & 45  
Vict. c. 41,  
§ 13.

On sub-  
demise,  
title to  
leasehold  
reversion  
not to be  
required.

Not retro-  
spective.

**13.**—(1.) On a contract to grant a lease for a term of years to be derived out of a leasehold interest, with a leasehold reversion, the intended lessee shall not have the right to call for the title to that reversion.

(2.) This section applies only if and as far as a contrary intention is not expressed in the contract, and shall have effect subject to the terms of the contract and to the provisions therein contained.

(3.) This section applies only to contracts made after the commencement of this Act.<sup>1</sup>

<sup>1</sup> For notes on this section, see s. 2 (1) of the V. & P. Act, 1874 (a).

(a) 37 & 33 Vict. c. 78, p. 193, *ante*.

## LEASE.—FORFEITURE.

**14.** (1.) A right of re-entry or forfeiture under any proviso or stipulation in a lease for a breach of any covenant or condition in the lease, shall not be enforceable,<sup>1</sup> by action or otherwise, unless and until the lessor serves on the lessee a notice specifying the particular breach complained of and, if the breach is capable of remedy, requiring the lessee to remedy the breach, and, in any case, requiring the lessee to make compensation in money for the breach, and the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach.

44 & 45  
Vict. c. 41,  
**§ 14.**  
—  
Restriction on  
and relief  
against  
forfeiture  
of leases.

(2.) Where a lessor is proceeding, by action or otherwise, to enforce such a right of re-entry or forfeiture, the lessee may, in the lessor's action, if any, or in any action brought by himself, apply<sup>2</sup> to the Court for relief; and the Court may grant or refuse relief, as the Court, having regard to the proceedings and conduct of the parties under the foregoing provisions of this section, and to all the other circumstances, thinks fit; and in case of relief may grant it on such terms, if any, as to costs, expenses, damages, compensation, penalty, or otherwise, including the granting of an injunction to restrain any like breach in the future, as the Court, in the circumstances of each case, thinks fit.<sup>3</sup>

Lessee  
may  
apply for  
relief.

(3.) For the purposes of this section a lease includes an original or derivative under-lease, also a grant at a fee farm rent, or securing a rent by condition; and a lessee includes an original or derivative under-lessee, and the heirs, executors, administrators, and assigns of a lessee, also a grantee under such a grant as aforesaid, his heirs and assigns; and a lessor includes an original or derivative under-lessor, and the heirs, executors, administrators, and assigns of a lessor, also a grantor as aforesaid, and his heirs and assigns.

Definition  
of lease.

44 & 45  
Vict. c. 41,  
§ 14.

Provision  
cannot be  
evaded.

(4.) This section applies, although the proviso or stipulation under which the right of re-entry or forfeiture accrues is inserted in the lease in pursuance of the directions of any Act of Parliament.

(5.) For the purposes of this section a lease limited to continue as long only as the lessee abstains from committing a breach of covenant shall be and take effect as a lease to continue for any longer term for which it could subsist, but determinable by a proviso for re-entry on such a breach.<sup>4</sup>

(6.) This section does not extend—

(i.) To a covenant or condition against the assigning, under-letting, parting with the possession, or disposing of the land leased; or to a condition for forfeiture on the bankruptcy<sup>5</sup> of the lessee, or on the taking in execution of the lessee's interest; or

(ii.) In case of a mining lease, to a covenant or condition for allowing the lessor to have access to or inspect books, accounts, records, weighing machines or other things, or to enter or inspect the mine or the workings thereof.

Repeal.

(7.) The enactments described in Part I. of the Second Schedule to this Act are hereby repealed.<sup>6</sup>

Rent.

(8.) This section shall not affect the law relating to re-entry or forfeiture or relief in case of non-payment of rent.<sup>7</sup>

Retrospec-  
tive.

(9.) This section applies to leases made either before or after the commencement of this Act, and shall have effect notwithstanding any stipulation to the contrary.<sup>4</sup>

<sup>1</sup> In the absence of such special circumstances as would induce a Court of Equity to exercise its ordinary jurisdiction, *e.g.*, fraud, accident, surprisc, mistake (*a*), there has, hitherto, been no power to relieve a lessee against provisions for right of re-entry or forfeiture, except in the two cases of breach of covenant to insure, and non-payment of rent, which are discussed in notes 6 and 7 to this section (*b*).

How ap-  
plication  
made.

<sup>2</sup> Sect. 69 (*c*) assigns all matters under the Act to the Chancery Division, and provides that every application shall, except where other-

(*a*) *Bamford v. Creasy*, 3 Giff. 675.

(*b*) Page 239, *post*.

(*c*) Page 320, *post*.

wise expressed, be by summons at chambers. But if an action by the lessor is pending in the Queen's Bench Divison, any application under this section must be made in that action. Where the lessee himself brings an action, his application for relief will of course be by writ in the ordinary way. In an Irish case the Court refused, upon motion in a lessor's action for recovery of land, to relieve the defendant against forfeiture of a lease for lives renewable for ever which had been forfeited by non-payment of renewal fees within the time stipulated by the lease, but liberty was given to the defendant to deliver a counterclaim (*d*).

44 & 45  
Vict. c. 41,  
**§ 14.**

Relief has been granted on the application of an equitable mortgagee of the lessee (*e*).

<sup>3</sup> "Putting the provisions of the Act together, they appear to me to justify the conclusion that, on the true construction, the 14th section of the Act is retrospective, and applies to breaches whenever committed, so long as the landlord has not obtained possession." *Per* LINDLEY, L.J. (*f*).

"Sub-section 2 gives the Court power to impose all such terms as are requisite to enable it to do justice to the landlord." *Per* BOWEN, L.J. (*g*).

<sup>4</sup> It must be observed that this section cannot be excluded either by express stipulation (sub-s. 9) or by limiting a term until breach of covenant (sub-s. 5). Nor can it be excluded by a proviso for cesser on breach of covenant, for such a proviso would confer a right of re-entry under a proviso within sub-s. 1. Provisions cannot be excluded.

<sup>5</sup> Bankruptcy includes "liquidation by arrangement," and any proceeding under any Act having results similar to those of bankruptcy (*h*). It, therefore, includes the winding-up of a company; and if in a lease to a company it is provided that the term shall determine on the company being "wound-up," the Court will enforce such provision (*i*).

<sup>6</sup> The Court previously had jurisdiction to relieve against rights of re-entry or forfeiture in two cases, *viz.*, on breach of covenant to insure and on non-payment of rent. In the former case relief could be given where the breach had been committed without fraud or gross negligence, and there was an insurance on foot at the time of the application to the Court in conformity with the covenant; but the Court could not relieve the same person more than once in respect of the same covenant. The relief might be granted upon rule or summons in a summary manner. The powers under which the Court acted in cases of breach of covenant to insure are contained in ss. 4 to 9 inclusive of Lord St. Leonards' Act, 1859 (*k*), and s. 2 of the Common Relief in case of non-insurance under Lord St. Leonards' Act.

(*d*) *Rutledge v. Whelan*, 10 L. R. Ir. 263.

(*e*) *North London Land Co. v. Jaques*, 32 W. R. 283. See *Jaques v. Harrison*, 12 Q. B. D. 136.

(*f*) *Quilter v. Mapleson*, 9 Q. B. D. 677.

(*g*) *Quilter v. Mapleson*, 9 Q. B. D. 677; *Bond v. Freke*, W. N. (1884), p. 47.

(*h*) Sect. 2 (xv), p. 211, *ante*.

(*i*) *Re Wetley Brick & Pottery Co.*, 30 W. R. 445.

(*k*) 22 & 23 Vict. c. 35

44 & 45 Law Procedure Act, 1860 (i), the provisions of which are superseded  
 Vict. c. 41, and extended by this section. Those sections are therefore repealed by  
**§ 14.** sub-s. 7 of this section.

Relief in  
 case of  
 non-pay-  
 ment of  
 rent.

<sup>7</sup> As to non-payment of rent, it will be observed that, by sub-s. 8, the provisions of the existing law are preserved. Those provisions are contained in ss. 210 to 212 inclusive of the Common Law Procedure Act, 1852 (k), and s. 1 of the Common Law Procedure Act, 1860 (l), which are as follows:—

15 & 16  
 Vict. c. 76,  
**§ 210.**

Relief  
 from for-  
 feiture for  
 non-pay-  
 ment of  
 rent under  
 C. L. P. A.  
 1859.

[210. In all cases between landlord and tenant, as often as it shall happen that one half year's rent shall be in arrear, and the landlord or lessor to whom the same is due hath right by law to re-enter for the non-payment thereof, such landlord or lessor shall and may, without any formal demand or re-entry, serve a writ in ejectment for the recovery of the demised premises, or in case the same cannot be legally served, or no tenant be in actual possession of the premises, then such landlord or lessor may affix a copy thereof upon the door of any demised messuage, or in case such action in ejectment shall not be for the recovery of any messuage, then upon some notorious place of the lands, tenements, or hereditaments comprised in such writ in ejectment, and such affixing shall be deemed legal service thereof, which service or affixing such writ in ejectment shall stand in the place and stead of a demand and re-entry; and in case of judgment against the defendant for non-appearance, if it shall be made to appear to the Court where the said action is depending, by affidavit, or be proved upon the trial in case the defendant appears, that half a year's rent was due before the said writ was served, that no sufficient distress was to be found on the demised premises, countervailing the arrears then due, and that the lessor had power to re-enter, then and in every such case the lessor shall recover judgment and execution, in the same manner as if the rent had been legally demanded and a re-entry made; and in case the lessee or his assignee, or other person claiming or

(i) 23 & 24 Vict. c. 126.  
 (k) 15 & 16 Vict. c. 76.

(l) 23 & 24 Vict. c. 126.

[deriving under the said lease, shall permit and suffer judgment to be had and recovered on such trial in ejectment, and execution to be executed thereon, without paying the rent and arrears, together with full costs, and without proceeding for relief in equity within six months after such execution executed, then and in such case the said lessee, his assignee, and all other persons claiming and deriving under the said lease, shall be barred and foreclosed from all relief or remedy in law or equity, other than by bringing error for the reversal of such judgment, in case the same shall be erroneous, and the said landlord or lessor shall from thenceforth hold the said demised premises discharged from such lease; and if on such ejectment a verdict shall pass for the defendant, or the claimant shall be nonsuited therein, then in every such case such defendant shall have and recover his costs: Provided that nothing herein contained shall extend to bar the right of any mortgagee of such lease, or any part thereof, who shall not be in possession, so as such mortgagee shall and do, within six months after such judgment obtained and execution executed, pay all rent in arrear, and all costs and damages sustained by such lessor or person entitled to the remainder or reversion as aforesaid, and perform all the covenants and agreements which, on the part and behalf of the first lessee, are and ought to be performed.]

44 & 45  
Vict. c. 41,  
**§ 14.**  
15 & 16  
Vict. c. 76,  
**§ 210.**

Relief  
under C.  
J. P. Act,  
1859.

[211. In case the said lessee, his assignee, or other person claiming any right, title, or interest, in law or equity, of, in, or to the said lease, shall, within the time aforesaid, proceed for relief in any Court of equity, such person shall not have or continue any injunction against the proceedings at law on such ejectment, unless he does or shall, within forty days next after a full and perfect answer shall be made by the claimant in such ejectment, bring into Court and lodge with the proper officer such sum and sums of money as the lessor or landlord shall in his answer swear to be due and in arrear over and above all just allowances, and also the costs taxed in the said suit, there to remain till the hearing

15 & 16  
Vict. c. 76,  
**§ 211.**  
Payment  
into Court  
required.



44 & 45  
Vict. c. 41,  
**§ 14.**  
15 & 16  
Vict. c. 76,  
**§ 211.**

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[of the cause, or to be paid out to the lessor or landlord on good security, subject to the decree of the Court; and in case such proceedings for relief in equity shall be taken within the time aforesaid, and after execution is executed, the lessor or landlord shall be accountable only for so much, and no more, as he shall really and *bond fide*, without fraud, deceit, or wilful neglect, make of the demised premises from the time of his entering into the actual possession thereof; and if what shall be so made by the lessor or landlord happen to be less than the rent reserved on the said lease, then the said lessee or his assignee, before he shall be restored to his possession, shall pay such lessor or landlord what the money so by him made fell short of the reserved rent for the time such lessor or landlord held the said lands.]

15 & 16  
Vict. c. 76,  
**§ 212.**  
Proceed-  
ings to be  
stayed.

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[212. If the tenant or his assignee do or shall, at any time before the trial in such ejectment, pay or tender to the lessor or landlord, his executors or administrators, or his or their attorney in that cause, or pay into the Court where the same cause is depending, all the rent and arrears, together with the costs, then and in such case, all further proceedings on the said ejectment shall cease and be discontinued; and if such lessee, his executors, administrators, or assigns, shall, upon such proceedings as aforesaid, be relieved in equity, he and they shall have, hold, and enjoy the demised lands, according to the lease thereof made, without any new lease.]

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23 & 24  
Vict. c.  
126,  
**§ 1.**

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Relief  
against  
forfeiture  
for non-  
payment  
of rent

[1. In the case of any ejectment for a forfeiture brought for nonpayment of rent, the Court or a judge shall have power, upon rule or summons, to give relief in a summary manner, but subject to appeal as hereinafter mentioned, up to and within the like time after execution executed, and subject to the same terms and conditions in all respects, as to payment of rent, costs, and otherwise, as in the Court of Chancery; and if the lessee, his executors, administrators,

or assigns, shall upon such proceeding be relieved, he and they shall hold the demised lands according to the lease thereof made, without any new lease.] 44 & 45  
Vict. c. 41,  
§ 14.  
23 & 24  
Vict. c.  
126,  
§ 1.

A tender of rent after the commencement of ejectment proceedings was held, in an Irish case, not to afford ground for a stay of proceedings (*m*).

Where a lessee claimed relief against forfeiture for nonpayment of rent, it was held that he need not pay the arrears and costs into Court under 4 Geo. II. c. 28, s. 3. But where the claim was by the executors of a deceased insolvent lessee, the Court required this to be done as a condition of granting an issue to determine whether other breaches of covenant had been committed or not (*n*). For although the Court would relieve against forfeiture for nonpayment of rent, it was ultimately settled, after some conflict of decision, that such relief would not be granted if the breach of other covenants which would enable the lessor to re-enter was proved (*o*). under C.  
L. P. A.,  
1860.

#### IV.—MORTGAGES.

##### TRANSFER.

**15.**—(1.) Where a mortgagor is entitled to redeem, he shall, by virtue of this Act, have power to require the mortgagee, instead of reconveying, and on the terms on which he would be bound to re-convey, to assign the mortgage debt and convey the mortgaged property to any third person, as the mortgagor directs<sup>1</sup>; and the mortgagee shall, by virtue of this Act, be bound to assign and convey accordingly. 44 & 45  
Vict. c. 41,  
§ 15.  
Obligation  
on mort-  
gagee to  
transfer  
instead of  
re-convey-  
ing.

(2.) This section does not apply in the case of a mortgagee being or having been in possession.

(3.) This section applies to mortgages made either before or after the commencement of this Act, and shall have effect notwithstanding any stipulation to the contrary. When  
section  
applies.

<sup>1</sup> Before the passing of the C. A., 1882 (*p*), it was held that a first mortgagee, who had notice of a second mortgage, could not be compelled by the mortgagor to convey to a third person under this section,

(*m*) *Allen v. O'Callaghan*, I. R. 10 C. L. 23.

(*n*) *Boxer v. Colley*, 1 H. 109.

(*o*) *Wadman v. Calcraft*, 10 Ves. 67; *Davis v. West*, 12 Ves. 475.

(*p*) 45 & 46 Vict. c. 39.

44 & 45  
Vict. c. 41,  
**§ 15.** but was justified in receiving payment from and conveying to the second mortgagee (*q*).

Where a mortgagor requires the mortgagee to transfer to his nominee the transfer is to be instead of a reconveyance, and to be on the terms on which he would be bound to reconvey (*r*). "I consider that the words 'on the terms on which he is bound to reconvey' do not refer merely to the amount of principal, interest and costs, but to 'the terms' generally."—*Per* CHITTY, J. (*s*). A mortgagor, therefore, who is entitled merely to a reconveyance on certain terms and conditions cannot require a mortgagee to make an absolute transfer to his nominee under this section (*t*).

It is now provided by section 12 of the C. A., 1882, as follows :—

45 & 46  
Vict. c. 39,  
**§ 12.** [12. The right of the mortgagor, under section 15 of the Conveyancing Act of 1881, to require a mortgagee, instead of re-conveying, to assign the mortgage debt and convey the mortgaged property to a third person, shall belong to and be capable of being enforced by each incumbrancer, or by the mortgagor, notwithstanding any intermediate incumbrance; but a requisition of an incumbrancer shall prevail over a requisition of the mortgagor, and, as between incumbrancers, a requisition of a prior incumbrancer shall prevail over a requisition of a subsequent incumbrancer.]

Reconvey-  
ance on  
mortgage  
under C. A.  
1882.

#### MORTGAGES.—INSPECTION OF DEEDS.

44 & 45  
Vict. c. 41,  
**§ 16.** 16.—(1.) A mortgagor, as long as his right to redeem subsists, shall, by virtue of this Act, be entitled from time to time, at reasonable times, on his request, and at his own cost, and on payment of the mortgagee's costs and expenses in this behalf, to inspect<sup>1</sup> and make<sup>2</sup> copies or abstracts of or extracts from the documents of title relating to the mortgaged property in the custody or power of the mortgagee.

Not retro-  
spective. (2.) This section applies only to mortgages made after the commencement of this Act,<sup>3</sup> and shall have effect notwithstanding any stipulation to the contrary.

(*q*) *Teeran v. Smith*, 20 Ch. D. 724.  
(*r*) *Teeran v. Smith*, 20 Ch. D. 724.

(*s*) *Alderson v. Elgey*, 26 Ch. D. 573.  
(*t*) *Alderson v. Elgey*, 26 Ch. D. 567.

<sup>1</sup> Hitherto a mortgagor could not compel his mortgagee to produce the deeds in his possession, except upon tender of the total amount due to him. 44 & 55  
Vict. c. 41,  
**§ 16.**

<sup>2</sup> It will be observed that the mortgagee is not bound to furnish copies, abstracts, or extracts, but only to permit the mortgagor to make them.

<sup>3</sup> It should be noted that this section is not retrospective, and applies only to mortgages dated after 31st December, 1881.

## MORTGAGES.—CONSOLIDATION.

**17.—(1.)** A mortgagor seeking to redeem<sup>1</sup> any one mortgage, shall, by virtue of this Act, be entitled to do so, without paying any money due under any separate mortgage made by him, or by any person through whom he claims, on property other than that comprised in the mortgage which he seeks to redeem. 44 & 45  
Vict. c. 41,  
**§ 17.**  
Restriction on consolidation of mortgages.

(2.) This section applies only if and as far as a contrary intention is not expressed in the mortgage deeds or one of them.<sup>2</sup> How far section applies

(3.) This section applies only where the mortgages or one of them are or is made after the commencement of this Act.<sup>3</sup>

<sup>1</sup> A mortgagor may seek to redeem (a) by giving notice to pay the amount due to the mortgagee without action, (β) by action for redemption, and (γ) by payment in a foreclosure action.

<sup>2</sup> In an action for the foreclosure of two mortgages executed since the commencement of this Act by the same mortgagor to the same mortgagee, PEARSON, J., held that if the mortgagor desired to redeem either mortgage separately he must pay the whole of the costs of the action and could not apportion them (u).

<sup>3</sup> It will, probably, be the usual practice to express a “contrary intention,” especially in cases where the mortgagee is likely to make further advances on other property belonging to the mortgagor.

<sup>4</sup> It will be observed that this section is so far retrospective that a mortgage executed before 31st December, 1881, cannot be consolidated with one executed after that date, in the absence of the expression of a contrary intention.

(u) *Clapham v. Andrews*, W. N. (1884), p. 152.

MORTGAGES.—POWER TO LEASE.<sup>1</sup>

44 & 45  
Vict. c. 41,  
§ 18.

Leasing  
powers of  
mortgagor  
and of  
mortgagee  
in posses-  
sion.

18.—(1.) A mortgagor<sup>2</sup> of land while in possession<sup>3</sup> shall, as against every incumbrancer, have, by virtue of this Act, power to make from time to time any such lease of the mortgaged land, or any part thereof, as in this section described and authorized.

(2.) A mortgagee<sup>2</sup> of land while in possession<sup>3</sup> shall, as against all prior incumbrancers, if any, and as against the mortgagor, have, by virtue of this Act, power to make from time to time any such lease as aforesaid.

(3.) The leases which this section authorizes<sup>4</sup> are—

- (i.) An agricultural or occupation lease for any term not exceeding twenty-one years ; and
- (ii.) A building lease for any term not exceeding ninety-nine years.

(4.) Every person making a lease under this section may execute and do all assurances and things necessary or proper in that behalf.

Conditions  
to be ob-  
served.

(5.) Every such lease shall be made to take effect in possession not later than twelve months after its date.<sup>6</sup>

(6.) Every such lease shall reserve the best rent that can reasonably be obtained, regard being had to the circumstances of the case, but without any fine being taken.<sup>6</sup>

(7.) Every such lease shall contain a covenant by the lessee for payment of the rent, and a condition of re-entry on the rent not being paid within a time therein specified not exceeding thirty days.<sup>6</sup>

(8.) A counterpart of every such lease shall be executed by the lessee and delivered to the lessor, of which execution and delivery the execution of the lease by the lessor shall, in favour of the lessee and all persons deriving title under him, be sufficient evidence.<sup>6</sup>

Building  
leases.

(9.) Every such building lease shall be made in consideration of the lessee, or some person by whose direction the lease is granted, having erected, or agreeing to erect within not more than five years from the date of the lease, buildings, new

or additional, or having improved or repaired buildings, or agreeing to improve or repair buildings within that time, or having executed, or agreeing to execute, within that time, on the land leased, an improvement for or in connection with building purposes.<sup>5</sup>

44 & 45  
Vict. c. 41,  
**§ 18.**

(10.) In any such building lease a peppercorn rent, or a nominal or other rent less than the rent ultimately payable, may be made payable for the first five years, or any less part of the term.

(11.) In case of a lease by the mortgagor, he shall, within one month after making the lease, deliver to the mortgagee, or, where there are more than one, to the mortgagee first in priority, a counterpart of the lease duly executed by the lessee; but the lessee shall not be concerned to see that this provision is complied with.

(12.) A contract to make or accept a lease under this section may be enforced by or against every person on whom the lease if granted would be binding.

(13.) This section applies only if and as far as a contrary intention is not expressed by the mortgagor and mortgagee in the mortgage deed, or otherwise in writing, and shall have effect subject to the terms of the mortgage deed or of any such writing and to the provisions therein contained.<sup>7</sup>

How far  
section  
applies.

(14.) Nothing in this Act shall prevent the mortgage deed from reserving to or conferring on the mortgagor or the mortgagee, or both, any further or other powers of leasing or having reference to leasing; and any further or other powers so reserved or conferred shall be exerciseable, as far as may be, as if they were conferred by this Act, and with all the like incidents, effects, and consequences, unless a contrary intention is expressed in the mortgage deed.<sup>7</sup>

Section  
may be  
varied.

(15.) Nothing in this Act shall be construed to enable a mortgagor or mortgagee to make a lease for any longer term or on any other conditions than such as could have been granted or imposed by the mortgagor, with the concurrence of all the incumbrancers, if this Act had not been passed.<sup>8</sup>

(16.) This section applies only in case of a mortgage made How far

44 & 45  
Vict. c. 41,  
§ 18.

retrospec-  
tive.

after the commencement of this Act;<sup>9</sup> but the provisions thereof, or any of them, may, by agreement in writing made after the commencement of this Act, between mortgagor and mortgagee, be applied to a mortgage made before the commencement of this Act, so, nevertheless, that any such agreement shall not prejudicially affect any right or interest of any mortgagee not joining in or adopting the agreement.

(17.) The provisions of this section referring to a lease shall be construed to extend and apply, as far as circumstances admit, to any letting, and to an agreement, whether in writing or not, for leasing or letting.<sup>10</sup>

Previous  
law as to  
leases of  
mortgaged  
land.

<sup>1</sup> Before this Act neither a mortgagor nor mortgagee, whether in or out of possession, could grant a lease which would be valid against the other. The mortgagee, having the legal estate, could, before the passing of the Judicature Act, grant a lease valid at law; but it would not bind the mortgagor in equity. Nor could the mortgagor grant a lease which would be valid against the mortgagee, though it would bind himself by estoppel.

<sup>2</sup> "Mortgagor includes any person from time to time deriving title under the original mortgagor, or entitled to redeem a mortgage, according to his estate, interest, or right in the mortgaged property" (*r*). In cases where it is desired to confine the power of leasing under sub-s. 1 to the original mortgagor, the statutory power should be varied under sub-s. 13 and 14. Or a proviso may be inserted that a clause excluding sub-s. 1 shall be inserted in any *puisne* mortgage of the same property.

<sup>3</sup> It will be observed that the powers conferred by this section can only be validly exercised by a mortgagor or mortgagee while in possession. See the definition of mortgagee in possession in s. 2 (vi.) (*s*).

<sup>4</sup> Compare the powers of leasing conferred on tenants for life by the Settled Estates Act, 1877 (*t*), and the Settled Land Act, 1882 (*u*).

Building  
lease.

<sup>5</sup> Under this Act a "building lease" includes a lease for building purposes, and "building purposes" include the erecting and the improving of and the adding to and *the repairing of* buildings (*x*). Compare the words of the power in *Truscott v. Diamond Rock Boring Co.* (*y*), under which a lease containing merely a covenant "to do necessary repairs" was upheld; and see sub-s. 9 of this section, which specifies the considerations for which a building lease under this section may be granted.

(*r*) Sect. 2 (vi.), p. 210, *ante*.

(*s*) Page 210, *ante*.

(*t*) 40 & 41 Vict. c. 17, p. 448.

(*u*) 45 & 46 Vict. c. 38, p. 479, *et seq.*

(*x*) Sect. 2 (x.), p. 211, *ante*.

(*y*) 30 W. R. 277.

<sup>6</sup> It should be remembered that, in order to render a lease under this section valid, the conditions prescribed by sub-ss. 5, 6, and 7 must be strictly complied with. Those prescribed by sub-ss. 8 and 11 ought also to be complied with; but non-compliance therewith does not render the lease invalid as regards the lessee. But see note <sup>9</sup>, *infra*.

44 & 45  
Vict. c. 41,  
**§ 18.**

Conditions  
must be  
strictly  
complied  
with.

<sup>7</sup> The powers conferred by this section may be altogether excluded, either by the mortgage deed or *any other writing*, leaving the previous law to apply; or they may be varied by stipulations in the mortgage-deed; and it will be difficult for a proposed lessee of mortgaged property to satisfy himself whether this has been done or not, unless he is able to insist upon a stipulation enabling him to investigate the proposed lessor's title.

This sec-  
tion may  
be ex-  
cluded.

<sup>8</sup> In the case of mortgage by a tenant for life, the provisions of this section must be read with those of ss. 4 to 14 and 46 to 48 of the Settled Estates Act, 1877 (*z*), and ss. 6 to 12 of the Settled Land Act, 1882 (*a*).

Tenant  
for life.

<sup>9</sup> In a mortgage executed after the Act came into operation in pursuance of an agreement made before it came into operation, NORTH, J., held that a proviso excluding this section ought not to be inserted (*b*).

<sup>10</sup> It may be doubted whether, notwithstanding sub-s. 17, any valid lease or tenancy under this section can be created otherwise than by deed, having regard to the express provision of sub-s. 7, that "*every such lease*" (*i.e.*, every lease authorized by this section) shall contain a covenant for payment of rent. Moreover, sub-ss. 5, 6, 8, and 11 clearly contemplate only leases in writing. It is probable, however, that sub-ss. 1, 2, and 17, when read together, may be held to authorize parol leases (from which such of the provisions of the intermediate sub-sections as are inapplicable to such leases would be excluded) for terms of less than three years.

Whether  
deed  
necessary.

## MORTGAGES.—SALE; INSURANCE; RECEIVER; TIMBER.<sup>1</sup>

**19.**—(1.) A mortgagee,<sup>2</sup> where the mortgage is made by deed,<sup>3</sup> shall, by virtue of this Act, have the following powers, to the like extent as if they had been in terms conferred by the mortgage deed, but not further (namely):

44 & 45  
Vict. c. 41,  
**§ 19.**

Powers  
incident to  
estates or  
interest of  
mortgagee.  
Power of  
sale.

(i.) A power, when the mortgage money has become due,<sup>4</sup> to sell, or to concur with any other person in selling, the mortgaged property, or any part thereof, either

(*z*) 40 & 41 Vict. c. 17, pp. 413, 448, *seq.*, *post.*  
*post.*

(*a*) 45 & 46 Vict. c. 38, p. 479, *et* (1884), p. 147.  
(*b*) *Re Nugent & Riley*, W. N.



44 & 45  
Vict. c. 41,  
**§ 19.**

subject to prior charges, or not, and either together or in lots, by public auction or by private contract, subject to such conditions respecting title, or evidence of title, or other matter, as he (the mortgagee) thinks fit, with power to vary any contract for sale, and to buy in at an auction, or to rescind any contract for sale, and to re-sell, without being answerable for any loss occasioned thereby;<sup>5</sup> and

Power to  
insure.

(ii.) A power, at any time after the date of the mortgage deed,<sup>4</sup> to insure and keep insured against loss or damage by fire any building, or any effects or property of an insurable nature, whether affixed to the freehold or not, being or forming part of the mortgaged property, and the premiums paid for any such insurance shall be a charge on the mortgaged property, in addition to the mortgage money, and with the same priority, and with interest at the same rate, as the mortgage money;<sup>6</sup> and

Power to  
appoint  
receiver.

(iii.) A power, when the mortgage money has become due,<sup>4</sup> to appoint a receiver of the income of the mortgaged property, or of any part thereof;<sup>7</sup> and

Power to  
cut timber.

(iv.) A power, while the mortgagee is in possession, to cut and sell timber and other trees ripe for cutting, and not planted or left standing for shelter or ornament, or to contract for any such cutting and sale, to be completed within any time not exceeding twelve months from the making of the contract.<sup>8</sup>

Powers  
may be  
varied,

(2.) The provisions of this Act relating to the foregoing powers, comprised either in this section, or in any subsequent section regulating the exercise of those powers, may be varied or extended by the mortgage deed, and, as so varied or extended, shall, as far as may be, operate in the like manner and with all the like incidents, effects, and consequences, as if such variations or extensions were contained in this Act.<sup>9</sup>

or ex-  
cluded.

(3.) This section applies only if and as far as a contrary intention is not expressed in the mortgage deed, and shall

have effect subject to the terms of the mortgage deed and to the provisions therein contained.<sup>9</sup>

(4.) This section applies only where the mortgage deed is executed after the commencement of this Act.

44 & 45  
Vict. c. 41,  
**§ 19.**

Not retro-  
spective.

<sup>1</sup> This section, if not excluded under sub-s. 3, applies to all mortgages of a later date than 31st December, 1881. This and the following sections may profitably be compared with Part II. of Lord Cranworth's Act (b), which, although repealed by s. 71 of this Act (c), still applies to some mortgages made between 28th August, 1860, and 1st January, 1882, and is, therefore, of practical importance in the investigation of titles.

Part II. of Lord Cranworth's Act comprises ss. 11 to 24 inclusive. Sections 11 and 24 (which correspond to s. 19 of the Conveyancing Act, 1881) are as follows:—

### *Powers of Mortgagees.*

[11. *Where any principal money is secured or charged by deed<sup>3</sup> on any hereditaments of any tenure, or on any interest therein, the person to whom such money shall for the time being be payable, his executors, administrators, and assigns, shall, at any time after the expiration of one year from the time when such principal money shall have become payable, according to the terms of the deed, or after any interest on such principal money shall have been in arrear for six months, or after any omission to pay any premium on any insurance which by the terms of the deed ought to be paid by the person entitled to the property subject to the charge,<sup>4</sup> have the following powers, to the same extent (but no more) as if they had been in terms conferred by the person creating the charge;<sup>5</sup> namely,*

*1st. A power to sell or concur with any other person in selling the whole or any part of the property by public auction or private contract, subject to any reasonable conditions he may think fit to make, and to rescind or vary contracts for sale, or buy in and re-sell the property, from time to time in like manner:*

23 & 24  
Vict. c.  
145,  
**§ 11.**

*Powers  
incident to  
mortgage  
under Lord  
Cran-  
worth's  
Act.*

*2nd. A power to insure and keep insured from loss or*

(b) 23 & 24 Vict. c. 145.

(c) Page 321, *post*.

44 & 45  
Vict. c. 41,  
**§ 19.**  
23 & 24  
Vict. c.  
145,  
**§ 11.**

---

*damage by fire the whole or any part of the property (whether affixed to the freehold or not) which is in its nature insurable, and to add the premiums paid for any such insurance to the principal money secured at the same rate of interest:*<sup>6</sup>

3rd. *A power to appoint or obtain the appointment of a receiver of the rents and profits of the whole or any part of the property in manner hereinafter mentioned.]*

23 & 24  
Vict. c.  
145,  
**§ 24.**

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[24. *The powers and provisions contained in this part of this Act relate only to mortgages or charges made to secure money advanced or to be advanced by way of loan, or to secure an existing or future debt.]*

<sup>2</sup> See the definition of mortgagee in the interpretation clause of the C. A., 1881 (*d*). It includes "any person from time to time deriving title under the original mortgagee."

Comparison of powers under Lord Cranworth's Act and under C. A. 1881.

<sup>3</sup> The powers conferred by this section—like those conferred by s. 11 of Lord Cranworth's Act—apply only where the mortgage is made by deed. But while the repealed provisions applied only to a mortgage or charge on *hereditaments*, a mortgage under the C. A. includes "*any* charge on *any* property for securing money or money's worth" (*e*). If, therefore, an equitable charge is taken by deed, the powers conferred by s. 19 will apply unless expressly excluded; but they will not apply to a parol charge or memorandum of deposit not under seal.

<sup>4</sup> The words "when the mortgage money has become due," and "at any time after the date of the mortgage deed," must be read with the qualifications mentioned in ss. 20 to 24, *post*, pp. 254-261. Even with those qualifications the present section is more favourable to mortgagees than either the powers conferred by s. 11 of Lord Cranworth's Act or the clauses hitherto usually inserted in mortgages.

Difference between powers under C. A. 1881, and ordinary express powers.

<sup>5</sup> The power of sale in s. 19 of the C. A., 1881, follows the usual form more closely than that in s. 11 of Lord Cranworth's Act. The mortgage money is usually made payable six months after the date of the deed, and the ordinary express power of sale is exerciseable when the principal is six months or the interest three months in arrear after notice, or, in some cases, on breach of any covenant by the mortgagor. The corresponding power in Lord Cranworth's Act only arises when the principal is twelve or the interest six months in arrear, or on breach of a covenant to insure, and s. 13 of that Act requires six months' notice in writing to the person entitled to the equity of redemption of the

(*d*) Sect. 2 (vi), p. 210, *ante*.

(*e*) Sect. 2 (vi), p. 210, *ante*.

mortgagee's intention to sell. The power of sale under the C. A., 1881, arises—like the ordinary express power—as soon as the mortgage money is due, and can be exercised as soon as the principal is three months or the interest is two months in arrear after notice requiring payment, or on breach by the mortgagor of any provision in the deed other than the covenants for payment of principal and interest.

44 & 45  
Vict. c. 41,  
§ 19.  
23 & 24  
Vict. c.  
145,  
§§ 11 &  
24.

<sup>6</sup> The ordinary express power for the mortgagee to insure is usually only inserted where there is a covenant by the mortgagor to insure, and arises on breach of that covenant. The similar power in Lord Cranworth's Act arises and is exerciseable in the same events as the power of sale. Under the C. A., 1881, the mortgagee may insure in two-thirds of the value of the property at any time after the date of the deed if there is no covenant by the mortgagor to insure, unless there is a sufficient subsisting insurance by the mortgagor or the deed contains a declaration that no insurance is necessary. See s. 23, p. 260, *post*. If there is a covenant by the mortgagor to insure, the mortgagee may insure on breach of that covenant. But the Act does not—like the usual clause—enable the mortgagee to ascertain whether or not there is a subsisting insurance by providing for the delivery or production to him of the receipts for premiums paid by the mortgagor. A short clause to that effect should therefore be inserted, whether there is a covenant by the mortgagor to insure or not.

<sup>7</sup> The power to appoint a receiver has not been very commonly inserted in ordinary mortgages. See notes to s. 24, p. 261, *post*.

Where an action is pending the Court will appoint a receiver on the application of the mortgagee, notwithstanding the power conferred on him by this section (*f*).

<sup>8</sup> The power to cut timber under this section is conferred only on a mortgagee in possession (see the definition in s. 2 (vi), p. 210, *ante*). No such power was given by Lord Cranworth's Act, nor is such a power commonly inserted in ordinary mortgages, and in the absence of such a power, a mortgagee would formerly have been restrained from cutting timber unless his security was insufficient.

The result is that a mortgagee who, between 1860 and 1882, has omitted the usual clauses in reliance upon Part II. of Lord Cranworth's Act is in a less favourable position than if they had been inserted, while a mortgagee who, after 1st January, 1882, omits them in reliance upon ss. 19 to 24 inclusive of the C. A., 1881, is in a more favourable position than under the ordinary express powers.

<sup>9</sup> The express powers to sell, and insure, with the usual ancillary provisions, may, therefore, in ordinary cases be safely omitted, and the statutory powers to appoint a receiver and to cut timber may either be left to take effect or be varied or excluded under sub-ss. 2 and 3, as the case may require.

(*f*) *Tillett v. Nixon*, 25 Ch. D. 238.

## MORTGAGES.—POWER OF SALE.—NOTICE.

44 & 45  
Vict. c. 41,  
§ 20.

Regulation  
of exercise  
of power  
of sale.

**20.** A mortgagee shall not exercise the power of sale conferred by this Act unless and until<sup>1</sup>—

- (i.) Notice<sup>2</sup> requiring payment of the mortgage money has been served on the mortgagor<sup>3</sup> or one of several mortgagors, and default has been made in payment of the mortgage money, or of part thereof, for three months<sup>4</sup> after such service; or
- (ii.) Some interest under the mortgage is in arrear and unpaid for two months after becoming due; or
- (iii.) There has been a breach of some provision contained in the mortgage deed or in this Act, and on the part of the mortgagor, or of some person concurring in making the mortgage, to be observed or performed, other than and besides a covenant for payment of the mortgage money or interest thereon.

<sup>1</sup> See note 5 to section 19, p. 252, *ante*.

<sup>2</sup> As to service of notices, see s. 67 of the C. A., 1881 (*g*).

<sup>3</sup> The mortgagor includes persons deriving title under the original mortgagor (*h*), and therefore notice must be served on the *puisne* mortgagees and assigns of the equity of redemption (*i*).

<sup>4</sup> Month means calendar month (*j*).

The provision as to notice in Lord Cranworth's Act is in s. 13, which is as follows:—

23 & 24  
Vict. c.  
145,  
§ 13.

Notice to  
be given  
before  
sale; but  
purchaser  
relieved  
from in-  
quiry as to

[13. *No such sale as aforesaid shall be made until after six months' notice in writing given to the person or one of the persons entitled to the property subject to the charge, or affixed on some conspicuous part of such property; but when a sale has been effected in professed exercise of the powers hereby conferred, the title of the purchaser shall not be liable to be impeached<sup>5</sup> on the ground that no case had arisen to authorise the exercise of such power, or*

(*g*) Page 318, *post*.

(*h*) Sect. 2 (*vi*), p. 210.

(*i*) *Hoole v. Smith*, 17 Ch. D. 434.

(*j*) *Freeman v. Read*, 11 W. R. 802.

*that no such notice as aforesaid had been given; but any person damnified by any such unauthorised exercise of such power shall have his remedy in damages against the person selling.]*

<sup>44 & 45  
Vict. c. 41,</sup>  
**§ 20.**  
<sup>23 & 24  
Vict. c.  
145,</sup>  
**§ 13.**

<sup>6</sup> For the provisions protecting a purchaser from the consequences of want of notice or uniformity in a sale under the C. A., 1881, see s. 21. <sup>circum-  
stances of  
sale.</sup>

SALE BY MORTGAGEE.—CONVEYANCE.

**21.—(1.)** A mortgagee exercising the power of sale conferred by this Act shall have power, by deed, to convey the property sold, for such estate and interest therein as is the subject of the mortgage, freed from all estates, interests, and rights to which the mortgage has priority, but subject to all estates, interests, and rights which have priority to the mortgage; except that, in the case of copyhold or customary land, the legal right to admittance shall not pass by a deed under this section, unless the deed is sufficient otherwise by law, or is sufficient by custom,<sup>1</sup> in that behalf.

<sup>44 & 45  
Vict. c. 41,</sup>  
**§ 21.**  
<sup>Convey-  
ance, re-  
ceipt, &c.,  
on sale.</sup>

**(2.)** Where a conveyance is made in professed exercise<sup>2</sup> of the power of sale conferred by this Act, the title of the purchaser shall not be impeachable on the ground that no case had arisen to authorise the sale, or that due notice was not given, or that the power was otherwise improperly or irregularly exercised; but any person damnified by an unauthorised, or improper, or irregular exercise of the power shall have his remedy in damages against the person exercising the power.<sup>3</sup>

<sup>Protection  
of pur-  
chaser.</sup>

**(3.)** The money which is received by the mortgagee, arising from the sale, after discharge of prior incumbrances to which the sale is not made subject, if any, or after payment into Court under this Act of a sum to meet any prior incumbrance,<sup>4</sup> shall be held by him in trust to be applied by him, first, in payment of all costs, charges, and expenses, properly

<sup>Applica-  
tion of  
purchase-  
money.</sup>

44 & 45  
Vict. c. 41,  
§ 21.

incurred by him, as incident to the sale or any attempted sale, or otherwise; and secondly, in discharge of the mortgage money, interest, and costs, and other money, if any, due under the mortgage; and the residue of the money so received shall be paid to the person entitled to the mortgaged property, or authorised to give receipts for the proceeds of the sale thereof.<sup>5</sup>

(4.) The power of sale conferred by this Act may be exercised by any person for the time being entitled to receive and give a discharge for the mortgage money.

(5.) The power of sale conferred by this Act shall not affect the right of foreclosure.

(6.) The mortgagee, his executors, administrators, or assigns, shall not be answerable for any involuntary loss happening in or about the exercise or execution of the power of sale conferred by this Act or of any trust connected therewith.

(7.) At any time after the power of sale conferred by this Act has become exerciseable, the person entitled to exercise the same may demand and recover from any person, other than a person having in the mortgaged property an estate, interest, or right in priority to the mortgage,<sup>4</sup> all the deeds and documents relating to the property, or to the title thereto, which a purchaser under the power of sale would be entitled to demand and recover from him.<sup>6</sup>

The corresponding provisions of Lord Cranworth's Act, except that as to the protection of purchasers, are contained in ss. 14 to 16 inclusive, which are as follows:—

23 & 24  
Vict. c.  
145,  
§ 14.

*Applica-  
tion of  
purchase  
money.*

[14. *The money arising by any sale effected as aforesaid shall be applied by the person receiving the same as follows; first, in payment of all the expenses incident to the sale or incurred in any attempted sale; secondly, in discharge of all interest and costs then due in respect of the charge in consequence whereof the sale was made; and, thirdly, in discharge of all the principal moneys then due in respect of such charge; and the residue of such money*



*shall be paid to the person entitled to the property subject to the charge, his heirs, executors, administrators, or assigns, as the case may be.]*

[15. *The person exercising the power of sale hereby conferred shall have power by deed to convey or assign to and vest in the purchaser the property sold, for all the estate and interest therein, which the person who created the charge had power to dispose of, except that in the case of copyhold hereditaments the beneficial interest only shall be conveyed to and vested in the purchaser by such deed.]*

[16. *At any time after the power of sale hereby conferred shall have become exerciseable, the person entitled to exercise the same shall be entitled to demand and recover, from the person entitled to the property subject to the charge, all the deeds and documents in his possession or power relating to the same property, or to the title thereto, which he would have been entitled to demand and recover if the same property had been conveyed, appointed, surrendered, or assigned to and were then vested in him for all the estate and interest which the person creating the charge had power to dispose of, and where the legal estate shall be outstanding in a trustee the person entitled to a charge created by a person equitably entitled, or any purchaser from such person, shall be entitled to call for a conveyance of the legal estate to the same extent as the person creating the charge could have called for such a conveyance if the charge had not been made.]*

44 & 45  
Vict. c. 41,  
§ 21.

23 & 24  
Vict. c.  
145,  
§ 14.

23 & 24  
Vict. c.  
145,  
§ 15.

Conveyance  
to the  
purchaser.

23 & 24  
Vict. c.  
145,  
§ 16.

Owner of  
charge  
may call  
for title  
deeds and  
conveyance  
of legal  
estate,  
under Lord  
Cran-  
worth's  
Act.

<sup>1</sup> In the case of ordinary copyholds mortgaged by covenant to surrender or conditional surrender, the legal estate can only be vested in the purchaser either by procuring his admittance or by a vesting order.

<sup>2</sup> A conveyance under the statutory power should contain an express reference thereto, in order completely to protect the purchaser.

<sup>3</sup> For the corresponding provision in Lord Cranworth's Act, see s. 13 thereof, p. 254, *ante*.

Compare the statutory provision with the proviso in *Dicker v. Angerstein* (k).



44 & 45  
Vict. c. 41,  
§ 21.  
23 & 24  
Vict. c.  
145,  
§§ 14—  
16.

Puisne incumbrancer may exercise power.

<sup>4</sup> The statutory power of sale can be exercised by a *puisne* incumbrancer. As to the payment into Court here referred to, see s. 5 (*l*). But where a prior mortgage of an earlier date than 1st January, 1882, is in existence, a practical difficulty will probably arise, unless the sale is made with the concurrence of the prior mortgagee who has possession of the deeds, in consequence of his right to refuse production of them in order to verify the abstract furnished to the purchaser by the selling mortgagee, except upon payment of the amount due to him. Where the prior mortgage is of a later date than 31st December, 1881, the vendor, being entitled to redeem, may compel production under s. 16 of the C. A., 1881 (*m*).

<sup>5</sup> The selling mortgagee will hold the surplus proceeds (as in the ordinary express power) in trust for the persons entitled thereto under sub-s. 3, and must see that they are paid to the proper persons, unless the difficulties of the case are such as to justify payment into Court under the Trustee Relief Act (*n*). But it is a constructive trust only, and not an express trust, and a claim for an account will therefore (subject to any acknowledgment) be barred by the Statutes of Limitation in six years (*o*).

<sup>6</sup> It will be observed that the provisions ancillary to a power of sale under the C. A., 1881, follow much more closely the usual express provisions than do those in Lord Cranworth's Act, and in the majority of mortgages they will be amply sufficient.

#### SALE BY MORTGAGEE.—RECEIPTS.

44 & 45  
Vict. c. 41,  
§ 22.

Mortgagee's receipts, discharges, &c.

**22.—(1.)** The receipt in writing of a mortgagee shall be a sufficient discharge for any money arising under the power of sale conferred by this Act,<sup>1</sup> or for any money or securities comprised in his mortgage, or arising thereunder; and a person paying or transferring the same to the mortgagee shall not be concerned to inquire whether any money remains due under the mortgage.<sup>2</sup>

(2.) Money received by a mortgagee under his mortgage or from the proceeds of securities comprised in his mortgage<sup>3</sup> shall be applied in like manner as in this Act directed

(*l*) Page 216, *ante*.  
(*m*) Page 244, *ante*,  
(*n*) 22 & 23 Vict. c. 35.

(*o*) *Banner v. Berridge*, 18 Ch. D. 254.

respecting money received by him arising from a sale under the power of sale conferred by this Act,<sup>4</sup> but with this variation, that the costs, charges, and expenses payable shall include the costs, charges, and expenses properly incurred of recovering and receiving the money or securities, and of conversion of securities into money, instead of those incident to sale.

44 & 45  
Vict. c. 41,  
**§ 22.**

The corresponding provision of Lord Cranworth's Act is in s. 12, which is as follows :

[12. *Receipts for purchase money given by the person or persons exercising the power of sale hereby conferred shall be sufficient discharges to the purchasers, who shall not be bound to see to the application of such purchase money.*]

23 & 24  
Vict. c.  
145,  
**§ 12.**

*Receipts  
under Lord  
Cran-  
worth's  
Act.*

With these may also be compared the provisions of s. 23 of Lord St. Leonard's Act (*p*), which is as follows :

[23. The *bonâ fide* payment to, and the receipt of, any person to whom any purchase or mortgage money shall be payable upon any express or implied trust, shall effectually discharge the person paying the same from seeing to the application or being answerable for the misapplication thereof, unless the contrary shall be expressly declared by the instrument creating the trust or security.]

22 & 23  
Vict. c. 35,  
**§ 23.**  
Lord St.  
Leonards'  
Act.

<sup>1</sup> It will be observed that the power of giving receipts is "for any money arising under the power of sale conferred by this Act." Such a power is only conferred as to mortgages dated subsequently to 31st December, 1881; and the question arises whether the words "or for any money or securities comprised in *his mortgage* or arising thereunder" are sufficient to make it applicable to a sale under a power contained in a mortgage of an earlier date, containing no express power to give receipts. It would probably be held inapplicable to such a case; but s. 23 of Lord St. Leonard's Act, 1859 (*q*), would apply in the case of a mortgage dated after 13th August, 1859. Sect. 36 of the C. A., 1881, p. 287, *post*, is limited to trustees.

Compare the statutory provisions with those in *Dicker v. Angerstein* (*r*).

<sup>2</sup> This section, which applies to money received by a mortgagee under

(*p*) 22 & 23 Vict. c. 35.

(*r*) 3 Ch. D. 600.

(*q*) 22 & 23 Vict. c. 35.

44 & 45 his mortgage otherwise than by sale, renders unnecessary the similar  
 Vict. c. 41, c'ause often inserted in mortgages of policies of life assurance and of  
**§ 22.** reversionary interests.

<sup>3</sup> The manner in which the money is to be applied is prescribed by  
 s. 21 (s).

### INSURANCE BY MORTGAGEE.

44 & 45 **23.**—(1.) The amount of an insurance effected by a mort-  
 Vict. c. 41, gagee against loss or damage by fire under the power in that  
**§ 23.** behalf conferred by this Act<sup>1</sup> shall not exceed the amount  
 Amount and appli- specified in the mortgage deed, or if no amount is therein  
 cation of insurance specified, then shall not exceed two third parts of the amount  
 money. that would be required, in case of total destruction, to restore  
 the property insured.<sup>2</sup>

(2.) An insurance shall not, under the power conferred by  
 this Act, be effected by a mortgagee in any of the following  
 cases (namely):

- (i.) Where there is a declaration in the mortgage deed that  
 no insurance is required:
- (ii.) Where an insurance is kept up by or on behalf of the  
 mortgagor in accordance with the mortgage deed:
- (iii.) Where the mortgage deed contains no stipulation  
 respecting insurance, and an insurance is kept up by  
 or on behalf of the mortgagor, to the amount in which  
 the mortgagee is by this Act authorised to insure.

(3.) All money received on an insurance effected under the  
 mortgage deed or under this Act shall, if the mortgagee so  
 requires, be applied by the mortgagor in making good the loss  
 or damage in respect of which the money is received.

(4.) Without prejudice to any obligation to the contrary  
 imposed by law,<sup>3</sup> or by special contract, a mortgagee may  
 require that all money received on an insurance be applied in  
 or towards discharge of the money due under his mortgage.

<sup>1</sup> By s. 19 (t).

<sup>2</sup> Where a mortgage contains no covenant by the mortgagor to insure and no declaration that no insurance is required, it will always be advisable to specify the amount at which the property may be insured, in order to avoid possible disputes as to the amount authorised by this sub-section.

A policy of assurance is a contract of indemnity, and the insurance company has the option of reinstating the property if practicable instead of paying over the insurance money, if not satisfied as to the intended application of the insurance money (u). But this applies only to buildings, and not to trade fixtures (x).

<sup>3</sup> Where buildings belonging to a benefice are insured under the Ecclesiastical Dilapidations Act (y), any money paid by the company must, under s. 56 of that Act, be applied in restoring them.

44 & 45  
Vict. c. 41,  
**§ 23.**

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MORTGAGEE'S RECEIVER.

**24.—(1.)** A mortgagee entitled to appoint a receiver under the power in that behalf conferred by this Act shall not appoint a receiver until he has become entitled to exercise the power of sale conferred by this Act,<sup>1</sup> but may then, by writing under his hand, appoint such person as he thinks fit to be receiver.<sup>2</sup>

44 & 45  
Vict. c. 41,  
**§ 24.**

Appoint-  
ment of  
receiver to  
be agent  
of mort-  
gagor.

(2.) The receiver shall be deemed to be the agent of the mortgagor; and the mortgagor shall be solely responsible for the receiver's acts or defaults, unless the mortgage deed otherwise provides.<sup>3</sup>

(3.) The receiver shall have power to demand and recover all the income of the property of which he is appointed receiver, by action, distress, or otherwise, in the name either of the mortgagor or of the mortgagee, to the full extent of the estate or interest which the mortgagor could dispose of, and to give effectual receipts, accordingly, for the same.

Power of  
receiver.

(4.) A person paying money to the receiver shall not be concerned to inquire whether any case has happened to authorise the receiver to act.<sup>4</sup>

(t) Page 249, *ante*.

(u) 14 Geo. III. c. 78, s. 83.

(x) *Ex parte Gorely*, 4 D. J. S. 477.

(y) 34 & 35 Vict. c. 43.

44 & 45  
Vict. c. 41,  
**§ 24.**

Removal  
of receiver.

Remune-  
ration of  
receiver.

Receiver  
may in-  
sure.

Applica-  
tion of  
money by  
receiver.

(5.) The receiver may be removed, and a new receiver may be appointed, from time to time by the mortgagee by writing under his hand.<sup>5</sup>

(6.) The receiver shall be entitled to retain out of any money received by him, for his remuneration, and in satisfaction of all costs, charges, and expenses incurred by him as receiver, a commission at such rate, not exceeding five per centum on the gross amount of all money received, as is specified in his appointment, and if no rate is so specified, then at the rate of five per centum on that gross amount, or at such higher rate as the Court thinks fit to allow, on application<sup>6</sup> made by him for that purpose.

(7.) The receiver shall, if so directed in writing by the mortgagee, insure and keep insured against loss or damage by fire, out of the money received by him, any building, effects, or property comprised in the mortgage, whether affixed to the freehold or not, being of an insurable nature.

(8.) The receiver shall apply all money received by him as follows (namely):

- (i.) In discharge of all rents, taxes, rates, and outgoings whatever affecting the mortgaged property; and
- (ii.) In keeping down all annual sums or other payments, and the interest on all principal sums, having priority to the mortgage in right whereof he is receiver; and
- (iii.) In payment of his commission, and of the premiums on fire, life, or other insurances, if any, properly payable under the mortgage deed or under this Act, and the cost of executing necessary or proper repairs directed in writing by the mortgagee; and

(iv.) In payment of the interest accruing due in respect of any principal money due under the mortgage;

and shall pay the residue of the money received by him to the person who, but for the possession of the receiver, would have been entitled to receive the income of the mortgaged property, or who is otherwise entitled to that property.

The corresponding provisions of Lord Cranworth's Act are contained in ss. 17 to 23 inclusive. As to the cases in which those provisions are still applicable, notwithstanding their repeal, see s. 71 (y). They are as follows:—

- [17. *Any person entitled to appoint or obtain the appointment of a receiver as aforesaid may from time to time, if any person or persons has or have been named in the deed of charge for that purpose, appoint such person or any one of such persons to be receiver, or if no person be so named, then may, by writing delivered to the person or any one of the persons entitled to the property subject to the charge, or affixed on some conspicuous part of the property, require such last-mentioned person or persons to appoint a fit and proper person as receiver, and if no such appointment be made within ten days after such requisition, then may in writing appoint any person he may think fit.*<sup>2</sup>]
- 23 & 24  
Vict. c.  
145,  
**§ 17.**  
*Appointment of receiver under Lord Cranworth's Act.*
- [18. *Every receiver appointed as aforesaid shall be deemed to be the agent of the person entitled to the property subject to the charge, who shall be solely responsible for his acts or defaults, unless otherwise provided for in the charge.*<sup>3</sup>]
- 23 & 24  
Vict. c.  
145,  
**§ 18.**  
*Receiver deemed to be the agent of the mortgagor.*
- [19. *Every receiver appointed as aforesaid shall have power to demand and recover and give effectual receipts for all the rents, issues, and profits of the property of which he is appointed receiver by action, suit, distress, or otherwise, in the name either of the person entitled to the property subject to the charge, or of the person entitled to the money secured by the charge, to the full extent of the estate or interest which the person who created the charge had power to dispose of.*]
- 23 & 24  
Vict. c.  
145,  
**§ 19.**  
*Powers of receiver.*
- [20. *Every receiver appointed as aforesaid may be removed by the like authority or on the like requisition as before provided with respect to the original appointment of a receiver, and new receivers may be appointed from time to time.*]
- 23 & 24  
Vict. c.  
145,  
**§ 20.**  
*Receiver may be removed.*

44 & 45  
Vict. c. 41,

**§ 24.**

23 & 24  
Vict. c.

145,

**§ 21.**

*Receiver  
to receive  
a commis-  
sion not  
exceeding  
five per  
cent.*

23 & 24

Vict. c.

145,

**§ 22.**

*Insurance  
by re-  
ceiver.*

23 & 24

Vict. c.

145,

**§ 23.**

*Moneys  
received  
by appoint-  
ment of  
receiver.*

[21. *Every receiver appointed as aforesaid shall be entitled to retain out of any money received by him, in lieu of all costs, charges, and expenses whatsoever, such a commission, not exceeding five per centum on the gross amount of all money received, as shall be specified in his appointment, and if no amount shall be so specified, then five per centum on such gross amount.*]

[22. *Every receiver appointed as aforesaid shall, if so directed in writing by the person entitled to the money secured by the charge, insure and keep insured from loss or damage by fire, out of the money received by him, the whole or any part of the property included in the charge (whether affixed to the freehold or not) which is in its nature insurable.*]

[23. *Every receiver appointed as aforesaid shall pay and apply all the money received by him in the first place in discharge of all taxes, rates, and assessments whatsoever, and in payment of his commission as aforesaid, and of the premiums on the insurances, if any, and in the next place in payment of all the interest accruing due in respect of any principal money then charged on the property over which he is receiver, or on any part thereof, and, subject as aforesaid, shall pay all the residue of such money to the person for the time being entitled to the property subject to the charge, his executors, administrators, or assigns.*]

*Compari-  
son of  
powers  
in Lord  
Cran-  
worth's  
Act and  
in C. A.  
1881.*

<sup>1</sup> As to when a mortgagee is entitled to exercise the statutory power of sale under the C. A. 1881, see note 5 to s. 19 (z), and s. 20 (a). The power to appoint a receiver under Lord Cranworth's Act only arose in the events mentioned in s. 11 of that Act (b). The power to *obtain* the appointment of a receiver is omitted in the new Act, inasmuch as the Court has, under the Judicature Act, power to appoint a receiver in a proper case at the instance of a mortgagee, whether he has the legal estate in the mortgaged property or not.

<sup>2</sup> It will be observed that the prior requisition to the mortgagor, provided for by Lord Cranworth's Act, is not now required.

(z) Page 252, *ante*.

(a) Page 254, *ante*.

(b) Page 251, *ante*.



<sup>3</sup> As to the effect of the appointment of a receiver by the Court, see Seton, 4th ed., 427.

44 & 45  
Vict. c. 41,  
**§ 24.**

<sup>4</sup> This provision was not in the repealed enactment. It does not preclude the necessity for a person who makes any payment to the receiver to satisfy himself that the receiver is duly appointed. The proper evidence of this will be production of (1) the mortgage to prove that it is by deed and does not exclude s. 19, and (2) the written appointment of the receiver.

<sup>5</sup> Inasmuch as a receiver may be appointed by *any* mortgagee, the question arises whether one appointed by a *puisne* mortgagee may, without being removed by him, be superseded by the subsequent appointment of another person by a prior mortgagee. An opinion has been expressed (c) that the appointment by any mortgagee suspends the right of all others—except in cases of unfitness or collusion, when the Court would, of course, interfere. On the other hand, it is said (d) that, as the power is given (see s. 19, p. 249, *ante*) to the like extent as if in terms conferred by the mortgage deed, the receiver of a *puisne* mortgagee will be liable to be superseded by the receiver (when appointed) of any prior mortgagee. The latter appears, to the present writer, to be the better opinion, for the mortgage deed of a *puisne* incumbrancer (with all powers and provisions therein) is subject to all prior mortgages and to the rights and powers thereby conferred on prior mortgagees.

Whether  
puisne  
mort-  
gagee's  
receiver  
may be  
super-  
seded.

<sup>6</sup> If a receiver considers that the special circumstances of the case are such as to render a commission of 5 per cent. on the gross receipts unremunerative, he may apply for a higher rate of remuneration by summons at chambers in the Chancery Division. See s. 69 (e).

#### ACTION RESPECTING MORTGAGE.<sup>1</sup>

**25.**—(1.) Any person entitled to redeem mortgaged property may have a judgment or order for sale instead of for redemption in an action brought by him either for redemption alone, or for sale alone, or for sale or redemption, in the alternative.

44 & 45  
Vict. c. 41,  
**§ 25.**

(2.) In any action, whether for foreclosure, or for redemption, or for sale, or for the raising and payment in any manner of mortgage money,<sup>2</sup> the Court, on the request of the

Sale of  
mortgaged  
property in  
action for  
fore-  
closure, &c.

(c) Clerke and Brett's C. A., p. 106. C. A., p. 72.

(d) Wolstenholme and Turner's (e) Page 320, *post*.



44 & 45  
Vict. c. 41,  
**§ 25.**

Security  
for costs.

mortgagee, or of any person interested either in the mortgage money or in the right of redemption, and notwithstanding the dissent of any other person, and notwithstanding that the mortgagee or any person so interested does not appear in the action,<sup>3</sup> and without allowing any time for redemption or for payment of any mortgage money, may, if it thinks fit, direct a sale of the mortgaged property,<sup>4</sup> on such terms as it thinks fit, including, if it thinks fit, the deposit in Court of a reasonable sum fixed by the Court, to meet the expenses of sale and to secure performance of the terms.

(3.) But, in an action brought by a person interested in the right of redemption and seeking a sale, the Court may, on the application of any defendant, direct the plaintiff to give such security for costs as the Court thinks fit,<sup>5</sup> and may give the conduct of the sale to any defendant, and may give such directions as it thinks fit respecting the costs of the defendants or any of them.<sup>6</sup>

(4.) In any case within this section the Court may, if it thinks fit, direct a sale without previously determining the priorities of incumbrancers.

(5.) This section applies to actions brought either before or after the commencement of this Act.<sup>7</sup>

(6.) The enactment described in Part II. of the Second Schedule to this Act is hereby repealed.<sup>1</sup>

(7.) This section does not extend to Ireland.

<sup>1</sup> This section supersedes and repeals s. 48 of the Improvement of the Jurisdiction of Equity Act, 1852 (*f*), which empowered the Court, in a foreclosure suit, to direct a sale instead of foreclosure at the request of the mortgagor, the mortgagee, or any subsequent incumbrancer. If the request was not by or with the consent of the mortgagee, a deposit by the person making the request was required.

Applies  
only to  
land com-  
prised in  
mortgage.

<sup>2</sup> This section does not empower the Court to sell property not comprised in the mortgage. Therefore, a tenant in common who has mortgaged his share, cannot, under this section and the Partition Acts, obtain judgment for sale without the consent of his mortgagee except upon the terms of paying off the mortgage (*g*).

(*f*) 15 & 16 Vict. c. 86.

See 31 W. R. 137.

(*g*) *Gibbs v. Haydon*, 30 W. R. 726.

<sup>3</sup> Equitable mortgagees brought an action for foreclosure, in which the mortgagor did not enter an appearance and a second mortgagee made default in pleading. At the trial the plaintiffs asked for a sale and the defendants did not appear. Judgment was given directing an account of what was due to the plaintiffs and directing a sale of so much of the property as should be sufficient to satisfy the amount certified to be due (*h*). In this case if the application had been by the mortgagor or second mortgagee and the plaintiff had not appeared, the Court would probably have directed a sale of the whole property freed from the first mortgage under this section and s. 5, on the deposit in Court of a sum sufficient to provide for the amount due to the plaintiffs and costs. But where foreclosure and not sale was claimed on the pleadings and the defendant did not appear, the Court refused to order a sale on motion for judgment, but gave liberty to apply in chambers, on notice to the defendant, for a sale (*i*).

44 & 45  
Vict. c. 41,  
§ 25.

Cases  
under this  
section.

<sup>4</sup> A sale may be directed on motion before trial (*k*) or after trial at any time before foreclosure absolute, notwithstanding the usual foreclosure judgment directing an account has been passed and entered (*l*).

"I think that according to the true construction of the Act there is nothing to prevent the Court from directing a sale at any time before the foreclosure absolute. The Act is a remedial Act, one effect of it being to allow a mortgagor, whose property is worth more than the mortgage money, but who cannot raise it, to obtain a sale and get the benefit of the surplus. The Act being remedial is to be construed liberally."—*Per* JESSEL, M. R. (*m*).

<sup>5</sup> In a foreclosure action an order for sale was refused on the application of a defendant who declined to give security for costs (*n*).

<sup>6</sup> Where the reserve price is sufficient to cover all the prior mortgages, the conduct of the sale will be given to the person most interested in obtaining a high price, even though he has not the title deeds (*o*).

Conduct  
of sale.

<sup>7</sup> So far is this section retrospective that, in a proper case, a sale may be ordered in an action in which the usual judgment for foreclosure *nisi* has been pronounced before the passing of the Act, and been partly worked out. But, of course, application for a sale must be made before foreclosure absolute (*p*).

How far  
retro-  
spective.

(*h*) *Wade v. Wilson*, 22 Ch. D. 235.

(*i*) *South Western Bank v. Turner*, 31 W. R. 113; *Stanley v. Grundy*, 27 S. J. 215.

(*k*) *Woolley v. Coleman*, 21 Ch. D. 169.

(*l*) *Union Bank of London v. Ingram*, 20 Ch. D. 463.

(*m*) *Ibid.*, p. 464.

(*n*) *Cripps v. Wood*, 51 L. J. Ch. 584; compare *Weston v. Davidson*, W. N. (1882) 28.

(*o*) *Woolley v. Coleman*, 21 Ch. D. 169.

(*p*) *Union Bank of London v. Ingram*, 20 Ch. D. 463.

## STATUTORY MORTGAGE.

44 & 45  
Vict. c. 41,  
§ 26.

Form of  
statutory  
mortgage  
in  
schedule.

**26.**—(1.) A mortgage of freehold or leasehold land may be made by a deed expressed to be made by way of statutory mortgage, being in the form given in Part I. of the Third Schedule to this Act,<sup>1</sup> with such variations and additions, if any, as circumstances may require, and the provisions of this section shall apply thereto.

(2.) There shall be deemed to be included, and there shall by virtue of this Act be implied, in the mortgage deed—

First, a covenant with the mortgagee by the person expressed therein to convey as mortgagor to the effect following (namely):

Covenant  
to repay,  
implied.

That the mortgagor will, on the stated day, pay to the mortgagee the stated mortgage money, with interest thereon in the meantime, at the stated rate, and will thereafter, if and as long as the mortgage money or any part thereof remains unpaid, pay to the mortgagee interest thereon, or on the unpaid part thereof, at the stated rate, by equal half-yearly payments, the first thereof to be made at the end of six calendar months from the day stated for payment of the mortgage money:

Secondly, a proviso to the effect following (namely):

Proviso  
for re-  
demption,  
implied.

That if the mortgagor, on the stated day, pays to the mortgagee the stated mortgage money, with interest thereon in the meantime, at the stated rate, the mortgagee at any time thereafter, at the request and cost of the mortgagor, shall re-convey the mortgaged property to the mortgagor, or as he shall direct.

<sup>1</sup> See the form here mentioned at p. 327, *post*. It is essential that a mortgage intended to take effect under this section should be by deed, and should be expressed to be made “by way of statutory mortgage,” and that the mortgagor should expressly convey “as mortgagor.” If this is done, a covenant for payment of principal and interest and proviso for redemption will be implied in addition to the powers of sale,

insurance, &c., implied under s. 19 (*q*), and the covenants for title implied under s. 7 (*r*). The writer sees no objection to the adoption of the statutory form, especially in simple cases, except that the rights and obligations of the parties do not appear on the face of the deed. This, however, is an objection which will equally apply to mortgages in which advantage is taken of the provisions of ss. 7 and 19; and it can scarcely be doubted that in the majority of mortgages those sections will be relied upon.

44 & 45  
Vict. c. 41,  
**§ 26.**

## TRANSFER OF STATUTORY MORTGAGE.

**27.**—(1.) A transfer of a statutory mortgage may be made by a deed expressed to be made by way of statutory transfer<sup>1</sup> of mortgage, being in such one of the three forms (A) and (B) and (C) given in Part II. of the Third Schedule to this Act as may be appropriate to the case, with such variations and additions, if any, as circumstances may require, and the provisions of this section shall apply thereto.

44 & 45  
Vict. c. 41,  
**§ 27.**  
Forms of  
statutory  
transfer of  
mortgage  
in  
schedule.

(2.) In whichever of those three forms the deed of transfer is made, it shall have effect as follows (namely):

(i.) There shall become vested in the person to whom the benefit of the mortgage is expressed to be transferred, who, with his executors, administrators, and assigns, is hereafter in this section designated the transferee, the right to demand, sue for, recover, and give receipts for the mortgage money, or the unpaid part thereof, and the interest then due, if any, and thenceforth to become due thereon, and the benefit of all securities for the same, and the benefit of and the right to sue on all covenants with the mortgagee, and the right to exercise all powers of the mortgagee:

Effect of  
statutory  
transfer.

(ii.) All the estate and interest, subject to redemption of the mortgagee in the mortgaged land, shall vest in the transferee, subject to redemption.

(3.) If the deed of transfer is made in the form (B), there shall also be deemed to be included, and there shall by virtue of this Act be implied therein, a covenant with the transferee

(*q*) Page 249, *ante*.

(*r*) Page 220, *ante*.

<sup>44 & 45</sup>  
<sup>Vict. c. 41,</sup>  
**§ 27.** by the person expressed to join therein as covenantor to the effect following (namely):

That the covenantor will, on the next of the days by the mortgage deed fixed for payment of interest, pay to the transferee the stated mortgage money, or so much thereof as then remains unpaid, with interest thereon, or on the unpaid part thereof, in the meantime, at the rate stated in the mortgage deed; and will thereafter, as long as the mortgage money, or any part thereof, remains unpaid, pay to the transferee interest on that sum, or the unpaid part thereof, at the same rate, on the successive days by the mortgage deed fixed for payment of interest.

(4.) If the deed of transfer is made in the form (C), it shall, by virtue of this Act, operate not only as a statutory transfer of mortgage, but also as a statutory mortgage, and the provisions of this section shall have effect in relation thereto, accordingly; but it shall not be liable to any increased stamp duty by reason only of it being designated a mortgage.

<sup>1</sup> See note to s. 26 (s), and see forms here referred to at p. 328, *post*.

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#### IMPLIED COVENANTS IN STATUTORY MORTGAGE.

<sup>44 & 45</sup>  
<sup>Vict. c. 41,</sup>  
**§ 28.** **28.** In a deed of statutory mortgage, or of statutory transfer of mortgage, where more persons than one are expressed to convey as mortgagors, or to join as covenantors, the implied covenant on their part shall be deemed to be a joint and several covenant by them; and where there are more mortgagees or more transferees than one, the implied covenant with them shall be deemed to be a covenant with them jointly, unless the amount secured is expressed to be secured to them in shares or distinct sums, in which latter case the implied covenant with them shall be deemed to be a covenant with each severally in respect of the share or distinct sum secured to him.

Implied  
covenants,  
joint and  
several.

(s) Page 268, *ante*.

## RE-CONVEYANCE OF STATUTORY MORTGAGE.

**29.** A re-conveyance of a statutory mortgage<sup>1</sup> may be made by a deed expressed to be made by way of statutory re-conveyance of mortgage, being in the form given in Part III. of the Third Schedule to this Act, with such variations and additions, if any, as circumstances may require.

44 & 45  
Vict. c. 41,  
**§ 29.**

Form of  
re-convey-  
ance of  
statutory  
mortgage  
in  
schedule.

<sup>1</sup> See the form here referred to at p. 329, *post*. This form is, of course, only applicable to cases where a statutory mortgage under s. 26 has been executed.

In the case of an ordinary mortgage, no short form of reconveyance is provided by the C. A., 1881 and 1882.

In the case of a mortgage to a building society, an indorsed receipt effectually vests the legal estate under s. 42 of the Building Societies Act, 1874 (*t*), which is as follows:—

[42. When all moneys intended to be secured by any mortgage or further charge given to a society under this Act in England or Ireland have been fully paid or discharged, the society may endorse upon or annex to such mortgage or further charge a re-conveyance of the mortgaged property to the then owner of the equity of redemption, or to such persons and to such uses as he may direct, or a receipt under the seal of the society, countersigned by the secretary or manager, in the form specified in the schedule to this Act, and such receipt shall vacate the mortgage or further charge or debt, and vest the estate of and in the property therein comprised in the person for the time being entitled to the equity of redemption without any re-conveyance or re-surrender whatever, and if the said mortgage or further charge has been registered under any Act for the registration or record of deeds or titles, the registrar under such Act, or his deputy or assistant registrar or the recording officer, as the case may be, or in the case of copyholds or lands of customary tenure, if the mortgage or further charge

37 & 38  
Vict. c. 42,  
**§ 42.**

Re-vesting  
of mort-  
gaged pro-  
perty  
under  
Building  
Societies  
Act, 1874.

44 & 45  
 Vict. c. 41,  
**§ 29.**  
 37 & 38  
 Vict. c. 42,  
**§ 42.**

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has been entered on any court rolls, the steward of the manor or his deputy respectively shall, on production of such receipt, verified by oath of any person, make an entry opposite the entry of the charge or mortgage, to the effect that such charge or mortgage is satisfied, and shall grant a certificate either on the said mortgage or charge or separately to the like effect, which certificate shall be received in evidence in all Courts and proceedings without any further proof, and which entry shall have the effect of clearing the register or record of such mortgage; and the registrar or recording officer shall be entitled to a fee of two shillings and sixpence for making the said entry and granting the said certificate, and such fee shall in Ireland be paid by stamps, and applied as the other fees of the Registry of Deeds Office and Record of Title Office are now by law directed to be paid and applied.]

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#### TRUST AND MORTGAGE ESTATES ON DEATH.

44 & 45  
 Vict. c. 41,  
**§ 30.**  
 Devolu-  
 tion of  
 trust and  
 mortgage  
 estates on  
 death.

**30.**—(1.) Where an estate or interest of inheritance, or limited to the heir as special occupant, in any tenements or hereditaments, corporeal or incorporeal, is vested on any trust, or by way of mortgage, in any person solely, the same shall, on his death, notwithstanding any testamentary disposition, devolve to and become vested in his personal representatives or representative from time to time, in like manner as if the same were a chattel real vesting in them or him; and accordingly all the like powers, for one only of several joint personal representatives, as well as for a single personal representative, and for all the personal representatives together, to dispose of and otherwise deal with the same, shall belong to the deceased's personal representatives or representative from time to time, with all the like incidents, but subject to all the like rights, equities, and obligations, as if the same were a chattel real vesting in them or him; and, for the purposes of

this section, the personal representatives, for the time being, of the deceased, shall be deemed in law his heirs and assigns, within the meaning of all trusts and powers. 44 & 45  
Vict. c. 41,  
§ 30.

(2.) Section four of the Vendor and Purchaser Act, 1874, and section forty-eight of the Land Transfer Act, 1875, are hereby repealed. Repeal of  
37 & 38  
Vict. c. 78,  
s. 4, and  
38 & 39

(3.) This section, including the repeals therein, applies only in cases of death after the commencement of this Act.<sup>1</sup> Vict. c. 87  
s. 48.

<sup>1</sup> This section applies to copyholds (*t*).

As to the form of order where there is no legal personal representative of a deceased trustee in existence, see and consider *Re Pilling* (*u*). See also s. 4 of the Vendor and Purchaser Act, 1874 (*x*).

#### TRUSTEES AND EXECUTORS.

**31.**<sup>1</sup>—(1.) Where a trustee, either original or substituted, and whether appointed by a Court or otherwise, is dead, or remains out of the United Kingdom for more than twelve months, or desires to be discharged from the trusts or powers reposed in or conferred on him, or refuses or is unfit to act therein, or is incapable of acting therein,<sup>2</sup> then the person or persons nominated for this purpose by the instrument, if any, creating the trust, or if there is no such person, or no such person able and willing to act, then the surviving or continuing trustees or trustee for the time being,<sup>3</sup> or the personal representatives of the last surviving or continuing trustee,<sup>3</sup> may, by writing,<sup>4</sup> appoint another person or other persons to be a trustee or trustees in the place of the trustee dead, remaining out of the United Kingdom, desiring to be discharged, refusing or being unfit, or being incapable, as aforesaid. 44 & 45  
Vict. c. 41,  
§ 31.  
Appoint-  
ment of  
new trus-  
tees, vest-  
ing of  
trust pro-  
perty, &c.

(2.) On an appointment of a new trustee, the number of trustees may be increased.<sup>5</sup>

(*t*) *Re Hughes*, W. N. (1884), p. 53.  
(*u*) 26 Ch. D. 432.

(*x*) 37 & 38 Vict. c. 78, p. 200, *ante*.



44 & 45  
Vict. c. 41,  
§ 31.

Increase  
or reduc-  
tion of  
number of  
trustees.

(3.) On an appointment of a new trustee, it shall not be obligatory to appoint more than one new trustee, where only one trustee was originally appointed, or to fill up the original number of trustees, where more than two trustees were originally appointed; but, except where only one trustee was originally appointed, a trustee shall not be discharged under this section from his trust unless there will be at least two trustees to perform the trust.<sup>5</sup>

Assurance  
of trust  
property.

(4.) On an appointment of a new trustee any assurance or thing requisite for vesting the trust property, or any part thereof, jointly in the persons who are the trustees, shall be executed or done.<sup>6</sup>

Powers of  
new  
trustees.

(5.) Every new trustee so appointed, as well before as after all the trust property becomes by law, or by assurance, or otherwise, vested in him, shall have the same powers, authorities, and discretions, and may in all respects act, as if he had been originally appointed a trustee by the instrument, if any, creating the trust.<sup>5</sup>

Nomina-  
tion of  
deceased  
trustee.

(6.) The provisions of this section relative to a trustee who is dead include the case of a person nominated trustee in a will but dying before the testator; and those relative to a continuing trustee include a refusing or retiring trustee, if willing to act in the execution of the provisions of this section.<sup>7</sup>

Section  
may be  
excluded.

(7.) This section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument and to any provisions therein contained.<sup>8</sup>

Retro-  
spective.

(8.) This section applies to trusts created either before or after the commencement of this Act.<sup>9</sup>

Compari-  
son of pro-  
visions of  
Lord Cran-  
worth's  
Act and  
C. A. 1881.

<sup>1</sup> This section takes the place of s. 27 of Lord Cranworth's Act (x), which is repealed by s. 71 (y) of this Act. The repealed enactment was not retrospective, and applied only to instruments executed (or in the case of wills) revived after 28th August, 1860, and prior to 1st January, 1882. The new section is retrospective, and therefore, unless excluded under sub-s. 7, applies to all instruments creating trusts, whether within

s. 27 of Lord Cranworth's Act or not. The last-mentioned section, therefore, has ceased to have any practical effect; but as it has been acted upon in the case of many instruments dated between 28th August, 1860, and 1st January, 1882, it will be desirable to point out the particulars in which it differed from s. 31 of the C. A. 1881.

44 & 45  
Vict. c. 41,  
**§ 31.**

<sup>2</sup> The events in which the power under Lord Cranworth's Act arose, were death, desire to be discharged, refusal, unfitness, and incapacity to act. In addition to these events, the new power is exerciseable in the event of absence from the United Kingdom for more than twelve months. Under the Trustee Acts, 1850 and 1852, it had been held that a temporary absence did not—but a permanent absence abroad did—render a trustee incapable to act (z). And it has now been held that a clause in 1878, indicating the persons by whom the then statutory powers were to be exercised, enables such persons to appoint in the place of a trustee who has been abroad more than twelve months under the new statutory power (a).

Absence  
abroad.

<sup>3</sup> In Lord Cranworth's Act the "last retiring trustee" was specified in addition to the persons here mentioned. But by sub-s. 6, a retiring or refusing trustee is a continuing trustee, if willing to act as such, under s. 21 of the C. A. 1881.

<sup>4</sup> As in Lord Cranworth's Act the appointment may be in writing, and need not necessarily be by deed. But where it is not by deed the power of vesting the trust estate conferred by s. 34 of the C. A. 1881 (b), cannot be exercised.

Deed  
necessary.

<sup>5</sup> Lord Cranworth's Act contained no provision for increasing or diminishing the number of trustees, and it was therefore usual to insert in settlements and wills a clause authorising the increase or diminution (but not to less than two) of the number of trustees. This will no longer be necessary.

Increase or  
reduction  
of number.

<sup>6</sup> Sect. 27 of Lord Cranworth's Act contained provisions similar in effect to those of sub-ss. 4 and 5; but in appointments under that Act, an actual transfer or assurance of the trust property to the new trustees was necessary. On an appointment under this section the trust property can, in many cases, be vested in them by a declaration under s. 34 (c).

Vesting of  
trust pro-  
perty.

<sup>7</sup> Sub-s. 6 corresponds with s. 28 of Lord Cranworth's Act, which is repealed by s. 71 of the C. A. (d).

<sup>8</sup> The powers conferred by ss. 27 and 28 of Lord Cranworth's Act only applied (e) in cases where there was no declaration excluding them, and took effect subject to any variations or limitations contained in the deed

(z) *Re Bignold's Settlement*, L. R. 7 Ch. 223.

(a) *Re Walker & Hughes' Contract*, 24 Ch. D. 698.

(b) Page 279, *post*.

(c) Page 279, *post*.

(d) Page 321, *post*.

(e) Sect. 32.

44 & 45  
Vict. c. 41,  
**§ 31.**

Increase  
or reduc-  
tion of  
number of  
trustees.

(3.) On an appointment of a new trustee, it shall not be obligatory to appoint more than one new trustee, where only one trustee was originally appointed, or to fill up the original number of trustees, where more than two trustees were originally appointed; but, except where only one trustee was originally appointed, a trustee shall not be discharged under this section from his trust unless there will be at least two trustees to perform the trust.<sup>5</sup>

Assurance  
of trust  
property.

(4.) On an appointment of a new trustee any assurance or thing requisite for vesting the trust property, or any part thereof, jointly in the persons who are the trustees, shall be executed or done.<sup>6</sup>

Powers of  
new  
trustees.

(5.) Every new trustee so appointed, as well before as after all the trust property becomes by law, or by assurance, or otherwise, vested in him, shall have the same powers, authorities, and discretions, and may in all respects act, as if he had been originally appointed a trustee by the instrument, if any, creating the trust.<sup>5</sup>

Nomina-  
tion of  
deceased  
trustee.

(6.) The provisions of this section relative to a trustee who is dead include the case of a person nominated trustee in a will but dying before the testator; and those relative to a continuing trustee include a refusing or retiring trustee, if willing to act in the execution of the provisions of this section.<sup>7</sup>

Section  
may be  
excluded.

(7.) This section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument and to any provisions therein contained.<sup>8</sup>

Retro-  
spective.

(8.) This section applies to trusts created either before or after the commencement of this Act.<sup>9</sup>

Compara-  
son of pro-  
visions of  
Lord Cran-  
worth's  
Act and  
C. A. 1881.

<sup>1</sup> This section takes the place of s. 27 of Lord Cranworth's Act (x), which is repealed by s. 71 (y) of this Act. The repealed enactment was not retrospective, and applied only to instruments executed (or in the case of wills) revived after 28th August, 1860, and prior to 1st January, 1882. The new section is retrospective, and therefore, unless excluded under sub-s. 7, applies to all instruments creating trusts, whether

(x) 23 & 24 Vict. c. 145.

(y) *Para* 321, *post*.

trustee was originally appointed, then one separate trustee may be so appointed for the first-mentioned part.

(2.) This section applies to trusts created either before or after the commencement of this Act].

44 & 45  
Vict. c. 41,  
§ 31.

45 & 46  
Vict. c. 39,  
§ 5.

separate  
sets of  
trustees.

## RETIREMENT OF TRUSTEES.

**32.**—(1.) Where there are more than two trustees, if one of them by deed declares that he is desirous of being discharged from the trust, and if his co-trustees and such other person, if any, as is empowered to appoint trustees, by deed consent to the discharge of the trustee, and to the vesting in the co-trustees alone of the trust property, then the trustee desirous of being discharged shall be deemed to have retired from the trust, and shall, by the deed, be discharged therefrom under this Act, without any new trustee being appointed in his place.<sup>1</sup>

44 & 45  
Vict. c. 41,  
§ 32.

Retiro-  
ment of  
trustee.

(2.) Any assurance or thing requisite for vesting the trust property in the continuing trustees alone shall be executed or done.<sup>2</sup>

(3.) This section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument and to any provisions therein contained.<sup>3</sup>

How far  
section  
applies.

(4.) This section applies to trusts created either before or after the commencement of this Act.

<sup>1</sup> This section, which is retrospective, will supersede the somewhat clumsy and complicated device which has been adopted when one of several acting trustees desired to retire. That device was for all the trustees to express their desire to be discharged and to retire, and then for all but one to be re-appointed.

The mode provided by this section is much more simple and infinitely preferable. It is only applicable to the case of a trustee who has acted as such.

44 & 45  
Vict. c. 41,  
§ 32.

Retire-  
ment of  
trustee.

A trustee who has not acted ought still to testify his refusal to accept the office, and to divest himself of any interest in the trust property by disclaimer.

Where a trustee retires under this section, the principal points to observe are—that he must do so by deed, that his co-trustees must consent, that the person empowered to appoint new trustees (if any, other than the trustees) must consent, and that there must be at least two continuing trustees left.

<sup>2</sup> Where the trust property is of such a nature as to admit of a declaration under s. 34, such a declaration will, usually, be the most convenient mode of vesting it in the continuing trustees. A mere disclaimer by the retiring trustee will not, of course, be sufficient.

<sup>3</sup> In cases where it is desired that the number of trustees shall never fall below three or more, a declaration to that effect should be inserted in the deed or will. It will seldom, if ever, be advisable to exclude this section altogether.

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#### POWERS OF NEW TRUSTEES.

44 & 45  
Vict. c. 41,  
§ 33.

Powers of  
new  
trustee  
appointed  
by Court.

Retro-  
spective.

**33.**—(1.) Every trustee appointed by the Court of Chancery, or by the Chancery Division of the Court, or by any other court of competent jurisdiction, shall, as well before as after the trust property becomes by law, or by assurance, or otherwise, vested in him, have the same powers, authorities, and discretions, and may in all respects act, as if he had been originally appointed a trustee by the instrument, if any, creating the trust.

(2.) This section applies to appointments made either before or after the commencement of this Act.<sup>1</sup>

<sup>1</sup> This section, as to trustees appointed by the Court, and sub-s. 5 of s. 31, as to trustees appointed under this Act, replace the similar provisions at the end of s. 27 of Lord Cranworth's Act (*m*), which is repealed by s. 71 of this Act.

VESTING TRUST ESTATE IN NEW TRUSTEES.

**34.**—(1.) Where a deed by which a new trustee is appointed to perform any trust<sup>1</sup> contains a declaration by the appointor to the effect that any estate or interest in any land subject to the trust, or in any chattel so subject, or the right to recover and receive any debt or other thing in action so subject, shall vest in the persons who by virtue of the deed become and are the trustees for performing the trust,<sup>2</sup> that declaration shall, without any conveyance or assignment, operate to vest in those persons, as joint tenants, and for the purposes of the trust, that estate, interest, or right.

44 & 45  
Vict. c. 41,  
**§ 34.**  
Vesting of  
trust pro-  
perty in  
new or  
continuing  
trustees.

(2.) Where a deed by which a retiring trustee is discharged under this Act contains such a declaration as is in this section mentioned by the retiring and continuing trustees, and by the other person, if any, empowered to appoint trustees, that declaration shall, without any conveyance or assignment, operate to vest in the continuing trustees alone,<sup>3</sup> as joint tenants, and for the purposes of the trust, the estate, interest, or right to which the declaration relates.

(3.) This section does not extend to any legal estate or interest in copyhold or customary land, or to land conveyed by way of mortgage for securing money subject to the trust, or to any such share, stock, annuity, or property as is only transferable in books kept by a company or other body, or in manner prescribed by or under Act of Parliament.<sup>4</sup>

Cases to  
which  
section in-  
applicable.

(4.) For purposes of registration of the deed in any registry, the person or persons making the declaration shall be deemed the conveying party or parties, and the conveyance shall be deemed to be made by him or them under a power conferred by this Act.<sup>5</sup>

How far  
declaration  
a "con-  
veyance."

(5.) This section applies only to deeds executed after the commencement of this Act.

<sup>1</sup> This section enables any person entitled to exercise a power of appointing new trustees to make a declaration which will have practically the same effect as a vesting order by the Court, and will, except

Declara-  
tion has  
effect of  
vesting

44 & 45 in the cases mentioned in sub-s. 3, render unnecessary any such vesting  
 Vict. c. 41, order or any other assurance of the trust property, either by the con-  
**§ 34.** tinuing trustees or by the real or personal representative of any deceased  
 trustee.

Section  
 retro-  
 spective.

The powers conferred by this section can be exercised only where a trustee is appointed by deed dated after 31st December, 1881; but such deed may relate to any trust, whether private or charitable, and whether created before or after the passing of the C. A. 1881.

Whether  
 section  
 applicable  
 to con-  
 tinuing  
 trustees.

<sup>2</sup> Doubts have been expressed as to the meaning of the words "the persons who by virtue of the deed become and are the trustees for performing the trust," and it has been pointed out that they do not, if construed strictly, apply to continuing trustees, but only to the new trustees appointed by the deed. On the other hand, it is contended (*n*) that "they include the old trustees as well as the new. The new trustees become trustees by virtue of the deed, but do not become *the* trustees for performing the trust, unless they are the sole trustees. The new and the old trustees together become the trustees for performing the trust." These remarks do not appear to the present writer to attach sufficient importance to the words "by virtue of the deed." It has been held, however, that the Act, being a remedial one, must be liberally construed (*o*), and it is probable that sub-s. 1 would be construed as if it had said "shall vest in the persons who, *after the execution* of the deed, are the trustees for performing the trust."

<sup>3</sup> It will be observed that sub-s. 2, which applies to the retirement of a trustee, provides for the vesting of the trust property in the *continuing* trustees.

<sup>4</sup> In the cases mentioned in sub-s. 3, the legal estate must be got in by conveyance, transfer, or vesting order as heretofore; and the deed appointing new trustees will contain a declaration similar to that inserted before the passing of the C.A. 1881.

<sup>5</sup> A declaration under this section is deemed a "conveyance" for purposes of registration. It appears also to be a "conveyance" within the terms of the definition in s. 2 (v.) (*p*); but as no one is expressed to convey as trustee, no covenant against incumbrances by the continuing or retiring trustees is implied under s. 7 (F) (*q*). A declaration under this Act appears to come within the definition of a conveyance in s. 78 of the Stamp Act, 1870 (*r*).; and a deed containing both an appointment of new trustees, and a declaration under this section, is within the principle of *Hadgett v. Commissioners of Inland Revenue* (*s*).

(*n*) Wolstenholme and Turner's C. A., 3rd ed., p. 85.

(*o*) *Union Bank of London v. Ingram*, 20 Ch. D. 463.

(*p*) Page 210, *ante*.

(*q*) Page 225, *ante*.

(*r*) 33 & 34 Vict. c. 97.

(*s*) 3 Ex. D. 46.

POWERS OF TRUSTEES FOR SALE.

**35.**—(1.) Where a trust for sale or a power of sale of property is vested in trustees, they may sell or concur with any other person in selling all or any part of the property, either subject to prior charges or not, and either together or in lots, by public auction or by private contract, subject to any such conditions respecting title or evidence of title, or other matter, as the trustees think fit, with power to vary any contract for sale, and to buy in at any auction, or to rescind any contract for sale, and to re-sell, without being answerable for any loss.

44 & 45  
Vict. c. 41,  
§ 35.

Power for  
trustees for  
sale to sell  
by auction,  
&c.

(2.) This section applies only if and as far as a contrary intention is not expressed in the instrument creating the trust or power, and shall have effect subject to the terms of that instrument, and to the provisions therein contained.

Section  
may be  
excluded.

(3.) This section applies only to a trust or power created by an instrument coming into operation after the commencement of this Act.<sup>1</sup>

Not retro-  
spective.

<sup>1</sup> This section applies only to deeds dated or wills coming into operation after 31st December, 1881, and, unless excluded, confers upon the trustees of such instruments all the powers usually expressly given to them as ancillary to their power of sale. Where there is a power to postpone sale, it will be necessary in cases not provided for by s. 42 (t) to insert clauses giving the trustees powers of management. See s. 38 (u), empowering a surviving trustee to act.

Not retro-  
spective.

Sections 1 to 3 (which form a portion of Part I.) of Lord Cranworth's Act (v), conferred somewhat similar, but less extensive powers upon trustees having a power of sale (but not a trust for sale) over hereditaments under any deed executed or will executed or revived after 28th August 1860, unless excluded or varied by the instrument creating the trust. The remaining sections of Part I. of that Act contain certain ancillary provisions applicable to sales mentioned in s. 1. Part I. of Lord Cranworth's Act is not affected by the C. A., 1881; but it is repealed by s. 64 of the S. L. A., 1882 (x), with the proviso that such repeal shall not affect (*inter alia*) any operation, effect, or consequence, of any in-

Provisions  
of Lord  
Cran-  
worth's  
Act and  
C. A., 1882  
compared.

(t) Page 291, *post*.

(u) Page 290, *post*.

(v) 23 & 24 Vict. c. 145.

(x) Page 535, *post*.



44 & 45  
Vict. c. 41,  
**§ 35.**

strument executed before the commencement of that Act. Notwithstanding the repeal, therefore, all instruments conferring a power of sale between 28th August, 1860, and 1st January, 1883, must be read as if the provisions of Part I. of Lord Cranworth's Act had been in terms inserted in them, unless such provisions are expressly excluded or varied by, or inconsistent with, the provisions contained in such instruments.

In most cases the powers so conferred are over-ridden by the extensive powers of sale conferred by the S. L. A., 1882, upon tenants for life; but they are still of some practical importance. They are contained in ss. 1 to 10 of Lord Cranworth's Act, which are as follows:—

POWERS OF TRUSTEES FOR SALE, ETC., AND TRUSTEES OF  
RENEWABLE LEASEHOLDS.

- 23 & 24  
Vict. c.  
145,  
**§ 1.**
- Trustees empowered to sell may sell in lots, and either by auction or private contract.*
- [1. *In all cases where by any will, deed, or other instrument of settlement it is expressly declared that trustees or other persons therein named or indicated shall have a power of sale, either generally, or in any particular event, over any hereditaments named or referred to in or from time to time subject to the uses or trusts of such will, deed, or other instrument, it shall be lawful for such trustees or other persons, whether such hereditaments be vested in them or not, to exercise such power of sale by selling such hereditaments, either together or in lots, and either by auction or private contract, and either at one time or at several times, and (in case the power shall expressly authorise an exchange) to exchange any hereditaments which for the time being shall be subject to the uses or trusts aforesaid for any other hereditaments in England or Wales or in Ireland (as the case may be), and upon such exchange to give or receive any money for equality of exchange.*]
- 23 & 24  
Vict. c.  
145,  
**§ 2.**
- Sale may be made under special*
- [2. *It shall be lawful for the person making any such sale or exchange to insert any such special or other stipulations, either as to title or evidence of title, or otherwise, in any conditions of sale, or contract for sale or exchange, as they shall think fit, and also to buy in the hereditaments or any part thereof at any sale by auction, and to rescind or*

*vary any contract for sale or exchange, and to re-sell the hereditaments which shall be so bought in, or as to which the contract shall be so rescinded, without being responsible for any loss which may be occasioned thereby, and no purchaser under any such sale shall be bound to inquire whether the persons making the same may or may not have in contemplation any particular re-investment of the purchase money in the purchase of any other hereditaments or otherwise.]*

44 & 45  
Vict. c. 41,  
**§ 35.**  
23 & 24  
Vict. c.  
145,  
**§ 2.**

conditions,  
and  
trustees  
may buy  
in, &c.

[3. *For the purpose of completing any such sale or exchange as aforesaid, the persons empowered to sell or exchange as aforesaid shall have full power to convey or otherwise dispose of the hereditaments in question, either by way of revocation and appointment of the use, or otherwise, as may be necessary.*]

23 & 24  
Vict. c.  
145,  
**§ 3.**

Trustees  
exercising  
power of  
sale, &c.,

[4. *The money so received upon any such sale or for equality of exchange as aforesaid shall be laid out in the manner indicated in that behalf in the will, deed, or instrument containing the power of sale or exchange, or if no such indication be therein contained as to all or any part of*

em-  
powered to  
convey.

23 & 24  
Vict. c.  
145,  
**§ 4.**

*such money, then the same shall with all convenient speed be laid out in the purchase of other hereditaments in fee simple in possession to be situate in England or Wales or in Ireland (as the case may be), or of lands of a leasehold or copyhold or customary tenure which, in the opinion of the persons making the purchase are convenient to be held therewith or with any other hereditaments for the time being, subject to the subsisting uses or trusts of the same will, deed, or other instrument of settlement in which the power of sale or exchange was contained; and all such hereditaments so to be purchased or taken in exchange as aforesaid as shall be freeholds of inheritance shall be settled and assured to the uses, upon and for the trusts, intents, and purposes, and with, under, and subject to the powers, provisos, and declarations, to which the hereditaments sold or given in exchange were or would have been subject, or as near thereto as the deaths of parties and*

Moneys  
arising  
from sales,  
&c., to be  
laid out in  
other  
lands;

44 & 45  
Vict. c. 41,  
**§ 35.**  
23 & 24  
Vict. c.  
**§ 4.**

---

*other intervening accidents will admit of, but not so as to increase or multiply charges; and all such hereditaments so to be purchased or taken in exchange as aforesaid as shall be of leasehold or copyhold or customary tenure shall be settled and assured upon and for such trusts, intents, and purposes, and with, under, and subject to such powers, provisoes, and declarations, as shall as nearly as may be correspond with and be similar to the aforesaid uses, trusts, intents, and purposes, powers, provisoes, and declarations, but not so as to increase or multiply charges, and so that if any of the hereditaments so to be purchased shall be held by lease for years the same shall not vest absolutely in any tenant in tail by purchase who shall not attain the age of twenty-one years; and any such purchase as aforesaid may be made subject to any special conditions as to title or otherwise: Provided that no leasehold tenement shall be purchased under the powers hereinbefore contained which is held for a less period than sixty years.]*

23 & 24  
Vict. c.  
145,  
**§ 5.**

---

*Payment of  
incum-  
brances.*

[5. *Provided nevertheless, that it shall be lawful for the persons exercising any such power as aforesaid, if they shall think fit, to apply any money to be received upon any sale or for equality of exchange as aforesaid, or any part thereof, in lieu of purchasing lands therewith, in or towards paying off or discharging any mortgage or other charge or incumbrance which shall or may affect all or any of the hereditaments which shall then be subject to the same uses or trusts as those to which the hereditaments sold or given in exchange were or was subject.]*

23 & 24  
Vict. c.  
145,  
**§ 6.**

---

*Money  
arising  
from sales,  
&c., not to  
be laid  
out, nor  
lands ex-  
changed,  
elsewhere*

[6. *No money arising from any such sale or exchange of lands or hereditaments in England or Wales shall be laid out in the purchase of lands or hereditaments situate elsewhere than in England or Wales, and no lands situate in England or Wales shall, under any such power as aforesaid, be exchanged for any lands or hereditaments situate elsewhere than in England or Wales; and no money arising from any such sale or exchange of lands in Ireland shall be laid out in the purchase of*

*lands or hereditaments situate elsewhere than in Ireland and no lands or hereditaments situate in Ireland shall, under any such power as aforesaid, be exchanged for any lands or hereditaments situate elsewhere than in Ireland.]*

44 & 45  
Vict. c. 41,  
**§ 35.**  
23 & 24  
Vict. c.  
145,  
**§ 6.**

[7. *Until the money to be received upon any sale or for equality of exchange as aforesaid shall be disposed of in the manner herein mentioned, the same shall be invested at interest for the benefit of the same parties who would be entitled to the hereditaments to be purchased therewith as aforesaid, and the rents and profits thereof, in case such purchase and settlement as aforesaid were then actually made.]*

*than in the country in which lands sold or exchanged are situated.*  
23 & 24  
Vict. c.  
145,  
**§ 7.**

[8. *It shall be lawful for any trustees of any leaseholds for lives or years which are renewable from time to time, either under any covenant or contract or by custom or usual practice, if they shall in their discretion think fit, and it shall be the duty of such trustees, if thereunto required by any person having any beneficial interest, present or future or contingent, in such leaseholds, to use their best endeavours to obtain from time to time a renewed lease of the same hereditaments on the accustomed and reasonable terms, and for that purpose it shall be lawful for any such trustees from time to time to make or concur in making such surrender of the lease for the time being subsisting, and to do all such other acts as shall be requisite in that behalf; but this section is not to apply to any case where by the terms of the settlement or will the person in possession for his life or other limited interest is entitled to enjoy the same without any obligation to renew the lease or to contribute to the expense of renewing the same.]*

*Until purchase of lands, &c., money to be invested at interest.*  
23 & 24  
Vict. c.  
145,  
**§ 8.**

*Trustees of renewable leaseholds may renew.*

[9. *In case any money shall be required for the purpose of paying for equality of exchange as aforesaid, or for renewal of any lease as aforesaid, it shall be lawful for the persons effecting such exchange or renewal to pay the same out of any money which may then be in their hands in trust for the persons beneficially interested in the lands*

23 & 24.  
Vict. c.  
145,  
**§ 9.**

*Money for equality of exchange and for*

44 & 45  
Vict. c. 41,  
**§ 35.**  
23 & 34  
Vict. c.  
145,  
**§ 9.**

*renewal of  
leases may  
be raised  
by mort-  
gage, &c.*

*to be taken in exchange, or comprised in the renewed lease, whether arising by any of the ways and means hereinbefore mentioned or otherwise, and notwithstanding the provisions for the application of money arising from sales or exchanges hereinbefore contained; and if they shall not have in their hands as aforesaid sufficient money for the purposes aforesaid, it shall be lawful for such persons to raise the money required by mortgage of the hereditaments to be received in exchange or contained in the renewed lease (as the case may be), or of any other hereditaments for the time being subject to the subsisting uses or trusts to which the hereditaments taken in exchange or comprised in the renewed lease (as the case may be) shall be subject, and for the purpose of effecting such mortgage such persons shall have the same powers of conveying or otherwise assuring as are herein contained with reference to a conveyance on sale; and no mortgagee advancing money upon such mortgage purporting to be made under this power shall be bound to see that such money is wanted, or that no more is raised than is wanted for the purposes aforesaid.]*

23 & 24  
Vict. c.  
145,  
**§ 10.**

*No sale,  
&c., to be  
made  
without  
consent of  
tenant for  
life, &c.,  
under Lord  
Cran-  
worth's  
Act.*

[10. *No such sale or exchange as aforesaid, and no purchase of hereditaments out of money received on any such sale or exchange as aforesaid, shall be made without the consent of the person appointed to consent by the will, deed, or other instrument, or if no such person be appointed, then of the person entitled in possession to the receipt of the rents and profits of such hereditaments, if there be such a person under no disability; but this clause shall not be taken to require the consent of any person where it appears from the will, deed, or other instrument to have been intended that such sale, exchange, or purchase should be made by the person or persons making the same without the consent of any other person.]*

See s. 56 of the S. L. A., 1882 (x), and compare the provisions of s. 63 (y) of that Act, as to a *trust for*, as distinguished from a *power of*, sale.

(x) 45 & 46 Vict. c. 38, p. 522, *post*.

(y) Page 530, *post*.

## TRUSTEES' RECEIPTS.

**36.**—(1.) The receipt in writing of any trustees or trustee for any money, securities, or other personal property or effects payable, transferable, or deliverable to them or him under any trust or power shall be a sufficient discharge for the same, and shall effectually exonerate the person paying, transferring, or delivering the same from seeing to the application or being answerable for any loss or misapplication thereof.

44 & 45  
Vict. c. 41,  
**§ 36.**  
—  
Trustees'  
receipts.

(2.) This section applies to trusts created either before or after the commencement of this Act.

This section, being retrospective, supersedes the similar power in s. 29 of Lord Cranworth's Act (z), which is repealed by s. 71 of the C. A., 1881. It will in future be unnecessary to insert power to give receipts in settlements, wills, or other instruments creating trusts.

The power conferred by s. 40 of the S. L. A., 1882 (a) may be compared with this section, as may also the practically superseded, but unrepealed, provision contained in s. 23 of Lord St. Leonards' Act, 1859 (b), which is as follows:—

[23. The bonâ fide payment to and the receipt of any person to whom any purchase or mortgage money shall be payable upon any express or implied trust shall effectually discharge the person paying the same from seeing to the application or being answerable for the misapplication thereof, unless the contrary shall be expressly declared by the instrument creating the trust or security.]

22 & 23  
Vict. c. 35  
**§ 23.**  
—  
Under  
Lord St.  
Leonards'  
Act, 1859.

Sect. 29 of Lord Cranworth's Act (c), which will still be of importance in the investigation of titles, applied only to deeds dated and wills coming into operation between 28th August, 1860, and 31st December 1881. It is as follows:—

[29. *The receipts in writing of any trustees or trustee for any money payable to them or him by reason or in the exercise of any trusts or powers reposed or vested in them or him shall be sufficient discharges for the money therein*

23 & 24  
Vict. c.  
145,  
**§ 29.**  
—  
Trustees'  
receipts

(z) 23 & 24 Vict. c. 145.

(a) 45 & 46 Vict. c. 38, p. 510, *post*.

(b) 22 & 23 Vict. c. 35.

(c) 23 & 24 Vict. c. 145.



44 & 45  
Vict. c. 41,  
**§ 36.**  
23 & 24  
Vict. c.  
145,  
**§ 29.**

*under  
Lord Cran-  
worth's  
Act.*

*expressed to be received, and shall effectually exonerate the persons paying such money from seeing to the application thereof, or from being answerable for any loss or misapplication thereof.]*

Where money had been paid into Court by a railway company upon the purchase of lands comprised in a settlement which contained a power of sale but no express power to give receipts, this section was held to confer on the trustees a power to give receipts, and the money was ordered to be paid out to them as persons "absolutely entitled" within the L. C. C. Act, 1845, s. 69, as construed in *Re Hobson's Trusts (d)*.

#### EXECUTOR AND TRUSTEES MAY COMPOUND.

44 & 45  
Vict. c. 41,  
**§ 37.**

*Power for  
executors  
and  
trustees to  
compound,  
&c.*

**37.**—(1.) An executor may pay or allow any debt or claim on any evidence that he thinks sufficient.

(2.) An executor, or two or more trustees<sup>1</sup> acting together, or a sole acting trustee where, by the instrument, if any, creating the trust, a sole trustee is authorised to execute the trusts and powers thereof,<sup>2</sup> may, if and as he or they think fit, accept any composition, or any security, real or personal, for any debt, or for any property, real or personal, claimed, and may allow any time for payment of any debt, and may compromise, compound, abandon, submit to arbitration, or otherwise settle any debt, account, claim, or thing whatever relating to the testator's estate or to the trust, and for any of those purposes may enter into, give, execute, and do such agreements, instruments of composition or arrangement, releases, and other things as to him or them seem expedient, without being responsible for any loss occasioned by any act or thing so done by him or them in good faith.

*Section  
may be  
extended.*

(3.) As regards trustees, this section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument and to the provisions therein contained.<sup>3</sup>

(d) 7 Ch. D. 708; *Re Thomas's Settlement*, W. N. 1882, p. 7.

(4.) This section applies to executorships and trusts constituted or created either before or after the commencement of this Act.<sup>4</sup>

44 & 45  
Vict. c. 41,  
**§ 37.**

<sup>1</sup> This section is more comprehensive than s. 30 of Lord Cranworth's Act (e) which applied only to executors, and is repealed by s. 71 of this Act.

S. 30 of Lord Cranworth's Act is as follows:

[30. *It shall be lawful for any executors to pay any debts or claims upon any evidence that they may think sufficient, and to accept any composition, or any security, real or personal, for any debts due to the deceased, and to allow any time for payment of any such debts as they shall think fit, and also to compromise, compound, or submit to arbitration all debts, accounts, claims, and things whatsoever relating to the estate of the deceased, and for any of the purposes aforesaid to enter into, give, and execute such agreements, instruments of composition, releases, and other things as they shall think expedient, without being responsible for any loss to be occasioned thereby.*]

23 & 24  
Vict. c.  
145,  
**§ 30.**

*Executors  
may com-  
pound  
under  
Lord Cran-  
worth's  
Act.*

The new provision will render the insertion of the powers which it in terms confers unnecessary in future trust deeds and wills.

But it will be observed that it does not include the usual powers to apportion blended trust funds, decide whether funds are capital or income and settle disputed questions.

This section applies both to executors and trustees, but not to administrators. Where there are more than two trustees two can apparently act alone in any transaction and bind the others.

<sup>2</sup> But, though a single executor may act alone under it, a sole acting trustee can, it will be observed, only do so where a sole trustee is authorised by the instrument creating the trust to execute the trusts and powers thereof. Where only one trustee has been appointed no difficulty can arise under this section. Where two or more trustees have originally been appointed, and the number has been reduced by death to one, the case is provided for, as to trusts created by instruments coming into operation after 31st December, 1881, by s. 38 (f); and, as to prior instruments, the usual reference to "the survivors or survivor" and to "the

(e) 23 & 24 Vict. c. 115.

(f) Page 290, *post*.



**44 & 45** trustees or trustee for the time being" will probably be sufficient. But  
**Vict. c. 41,** where two or more trustees of an instrument are in existence, it will  
**§ 37.** require a very express authority in the instrument to enable one of such  
trustees to act as a "sole acting trustee" in any transaction so as to bind  
the others, without their concurrence, whether such others are accus-  
tomed, as a rule, to act in the trusts or not.

**44 & 45** **38.**—(1.) Where a power or trust is given to or vested in  
**Vict. c. 41,** two or more executors or trustees jointly, then, unless the  
**§ 38.** contrary is expressed in the instrument, if any, creating the  
power or trust, the same may be exercised or performed by  
the survivor or survivors of them for the time being.<sup>1</sup>  
(2.) This section applies only to executorships and trusts  
constituted after or created by instruments coming into opera-  
tion after the commencement of this Act.

Powers to  
two or  
more exe-  
cutors or  
trustees.  
Not retro-  
spective.

<sup>1</sup> This section will render it unnecessary to insert in settlements and  
wills express words authorising the survivors or survivor of the trustees  
to act; but where it is desired to authorise the legal personal representa-  
tive of the survivor to act, it will still be necessary to do so expressly.

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### MARRIED WOMEN.

**44 & 45** **39.**—(1.) Notwithstanding that a married woman is  
**Vict. c. 41,** restrained from anticipation, the Court may, if it thinks fit,  
**§ 39.** where it appears to the Court to be for her benefit, by judg-  
ment or order, with her consent, bind her interest in any  
property.

Power for  
court to  
bind  
interest of  
married  
woman.

(2.) This section applies only to judgments or orders made  
after the commencement of this Act.

**44 & 45** **40.**—(1.) A married woman, whether an infant or not,  
**Vict. c. 41,** shall by virtue of this Act have power, as if she were un-  
**§ 40.** married and of full age, by deed, to appoint an attorney on  
her behalf for the purpose of executing any deed or doing any  
other act which she might herself execute or do; and the  
provisions of this Act relating to instruments creating powers  
of attorney shall apply thereto.

Power of  
attorney  
of married  
woman.

(2.) This section applies only to deeds executed after the commencement of this Act.

44 & 45  
Vict. c. 41,  
**§ 40.**

For notes on this section, see s. 19 of the M. W. P. A., 1882.

As to powers of attorney, see also ss. 46 to 48 of the C. A., 1881, *post*, p. 300, *et seq.*

### INFANTS' LAND.

**41.** Where a person in his own right seised of or entitled to land for an estate in fee simple, or for any leasehold interest at a rent, is an infant, the land shall be deemed to be a settled estate within the Settled Estates Act, 1877.

44 & 45  
Vict. c. 41,  
**§ 41.**  
— — —  
Sales and  
leases on  
behalf of  
infant  
owner.

See s. 2 of the S. E. A., 1877, p. 407, *post*.

### POWERS OF MANAGEMENT.

**42.—(1.)** If and as long as any person who would but for this section be beneficially entitled to the possession of any land is an infant,<sup>1</sup> and being a woman is also unmarried, the trustees appointed for this purpose by the settlement,<sup>2</sup> if any, or if there are none so appointed, then the persons, if any, who are for the time being under the settlement trustees with power of sale of the settled land, or of part thereof, or with power of consent to or approval of the exercise of such a power of sale, or if there are none, then any persons appointed as trustees for this purpose by the Court, on the application of a guardian or next friend of the infant, may enter into and continue in possession of the land; and in every such case the subsequent provisions of this section shall apply.

44 & 45  
Vict. c. 41,  
**§ 42.**  
— — —  
Manage-  
ment of  
land and  
receipt and  
application  
of income  
during  
minority.

(2.) The trustees shall manage or superintend the management of the land, with full power to fell timber or cut underwood from time to time in the usual course for sale, or for repairs or otherwise, and to erect, pull down, rebuild, and

General  
powers of  
manage-  
ment.

44 & 45  
Vict. c. 41,  
**§ 42.**

repair houses, and other buildings and erections, and to continue the working of mines, minerals, and quarries which have usually been worked, and to drain and or otherwise improve the land or any part thereof, and to insure against loss by fire, and to make allowances to and arrangements with tenants<sup>3</sup> and others, and to determine tenancies, and to accept surrenders of leases and tenancies, and generally to deal with the land in a proper and due course of management; but so that, where the infant is impeachable for waste, the trustees shall not commit waste, and shall cut timber on the same terms only, and subject to the same restrictions, on and subject to which the infant could, if of full age, cut the same.

Power to  
pay ex-  
penses.

(3.) The trustees may from time to time, out of the income of the land, including the produce of the sale of timber and underwood, pay the expenses incurred in the management, or in the exercise of any power conferred by this section, or otherwise in relation to the land, and all outgoings not payable by any tenant or other person, and shall keep down any annual sum, and the interest of any principal sum, charged on the land.

Power of  
mainten-  
ance.

(4.) The trustees may apply at discretion any income which, in the exercise of such discretion, they deem proper, according to the infant's age, for his or her maintenance, education, or benefit,<sup>4</sup> or pay thereout any money to the infant's parent or guardian,<sup>5</sup> to be applied for the same purposes.

Power of  
invest-  
ment.

(5.) The trustees shall lay out the residue of the income of the land in investment on securities on which they are by the settlement, if any, or by law,<sup>6</sup> authorized to invest trust money, with power to vary investments; and shall accumulate the income of the investments so made in the way of compound interest, by from time to time similarly investing such income and the resulting income of investments; and shall stand possessed of the accumulated fund arising from income of the land and from investments of income on the trusts following (namely):

- (i.) If the infant attains the age of twenty-one years, then in trust for the infant; 44 & 45  
Vict. c. 41,  
§ 42.
- (ii.) If the infant is a woman and marries while an infant, then in trust for her separate use, independently of her husband, and so that her receipt after she marries, and though still an infant, shall be a good discharge; Applica-  
tion of  
accumula-  
tions.  
but
- (iii.) If the infant dies while an infant, and being a woman without having been married, then, where the infant was, under a settlement, tenant for life, or by purchase tenant in tail or tail male or tail female, on the trusts, if any, declared of the accumulated fund by that settlement; but where no such trusts are declared, or the infant has taken the land from which the accumulated fund is derived by descent, and not by purchase, or the infant is tenant for an estate in fee simple, absolute or determinable, then in trust for the infant's personal representatives, as part of the infant's personal estate;

but the accumulations, or any part thereof, may at any time be applied as if the same were income arising in the then current year.

(6.) Where the infant's estate or interest is in an undivided share of land, the powers of this section relative to the land may be exercised jointly with persons entitled to possession of, or having power to act in relation to, the other undivided share or shares. Where  
infant  
part-  
owner.

(7.) This section applies only if and as far as a contrary intention is not expressed in the instrument under which the interest of the infant arises, and shall have effect subject to the terms of that instrument and to the provisions therein contained. Section  
may be  
excluded.

(8.) This section applies only where that instrument comes into operation after the commencement of this Act.<sup>7</sup> Not retro-  
spective.

<sup>1</sup> This section applies, unless excluded, to cases where, under a deed or will which comes into operation after 31st December, 1881, an infant is

44 & 45 Vict. c. 41, entitled to the possession of land, whether as tenant for life, in tail or in fee.

### § 42.

In strict and other settlements of real estate—either by deed or will—the clauses giving similar powers to trustees may, in most cases, be safely omitted in reliance upon this section.

Inapplic-  
able where  
trust for  
conversion.

It appears to apply only to cases where an infant is entitled to land *as land*, and not to the common case of a conveyance or devise of real estate in trust for sale, with power to postpone, and a settlement of the proceeds as personalty. Until sold, the land comprised in such a settlement is “settled land” within the S. L. A. 1882 (*g*), and the person who is entitled to the income may, if *sui juris*, exercise the extensive powers as to leases and sales conferred by that Act on a tenant for life, subject, however, to the restrictions imposed by s. 7 of the S. L. A. 1884 (*h*) and to the saving in s. 6 of the same Act (*i*) in favour of express powers conferred upon trustees by the instrument creating the trust. If such person is an infant, the powers of a tenant for life may be exercised by the trustees (*k*).

But the Act does not contain any provisions for management applicable to such a settlement during the postponement of sale. And it will therefore, in such cases, still be prudent to insert a clause giving the trustees express powers of management until sale. This may easily be done by reference to this section.

<sup>2</sup> In any event, a clause should be inserted nominating trustees for the purposes of this section.

<sup>3</sup> It may be doubted whether the power to make arrangements with tenants would authorise the granting of a lease. But this can be done by the trustees under ss. 6 and 60 of the S. L. A., 1882 (*l*).

<sup>4</sup> As to the meaning of “benefit,” see note to s. 43, *post*.

<sup>5</sup> It will be observed that the trustees may, as under s. 43, pay the income to the infant’s parent or guardian.

<sup>6</sup> As to the securities in which trustees are, by law, authorized to invest, see Lewin, 7th ed., p. 282 *et seq.*; Godefroi, pp. 131—4.

<sup>7</sup> Trustees under instruments which came into operation before 1st January, 1882, have no statutory powers corresponding to those of this section. In most cases express powers are conferred on them by the instruments.

(*g*) 45 & 46 Vict. c. 38, s. 63, p. 530, *post*.

(*h*) Page 533, *post*.

(*i*) Page 522, *post*.

(*k*) *Ibid.*, s. 60, p. 527, *post*.

(*l*) 45 & 46 Vict. c. 38, pp. 479 and 527, *post*.

## POWER OF MAINTENANCE.

**43.**—(1.) Where any property is held by trustees in trust for an infant,<sup>1</sup> either for life, or for any greater interest, and whether absolutely or contingently<sup>2</sup> on his attaining the age of twenty-one years, or on the occurrence of any event before<sup>3</sup> his attaining that age, the trustees may, at their sole discretion, pay to the infant's parent<sup>4</sup> or guardian, if any, or otherwise apply for or towards the infant's maintenance, education, or benefit,<sup>6</sup> the income of that property,<sup>5</sup> or any part thereof, whether there is any other fund applicable to the same purpose, or any person bound by law to provide for the infant's maintenance or education, or not.

44 & 45  
Vict. c. 41,  
**§ 43.**

Applica-  
tion by  
trustees of  
income of  
property of  
infant for  
mainten-  
ance, &c.

(2.) The trustees shall accumulate all the residue of that income in the way of compound interest, by investing the same and the resulting income thereof from time to time on securities on which they are by the settlement, if any, or by law,<sup>3</sup> authorized to invest trust money, and shall hold those accumulations for the benefit of the person who ultimately becomes intitled to the property from which the same arise; but so that the trustees may at any time, if they think fit, apply those accumulations, or any part thereof, as if the same were income arising in the then current year.

Accumu-  
lation.

(3.) This section applies only if and as far as a contrary intention<sup>7</sup> is not expressed in the instrument under which the interest of the infant arises, and shall have effect subject to the terms of that instrument and to the provisions therein contained.

Section  
may be  
extended.

(4.) This section applies whether that instrument comes into operation before or after the commencement of this Act.

Section  
retrospec-  
tive.

<sup>1</sup> This section re-enacts, with amendments, s. 26 of Lord Cranworth's Act; that section is repealed by s. 71, and is as follows:—

[26. *In all cases where any property is held by trustees in trust for an infant, either absolutely, or contingently on his attaining the age of twenty-one years, or on the occurrence of any event previously to his attaining that*

23 & 24  
Vict. c.  
145,  
**§ 26.**

44 & 45  
Vict. c. 41,  
**§ 43.**  
23 & 24  
Vict. c.  
145,  
**§ 26.**

*Trustees  
may apply  
income of  
property of  
infants, &c.  
for their  
mainten-  
ance under  
Lord Cran-  
worth's  
Act.*

*age, it shall be lawful for such trustees, at their sole discre-  
tion, to pay to the guardians (if any) of such infant, or  
otherwise to apply for or towards the maintenance or  
education of such infant, the whole or any part of the  
income to which such infant may be entitled in respect of  
such property, whether there be any other fund applicable  
to the same purpose, or any other person bound by law  
to provide for such maintenance or education, or not; and  
such trustees shall accumulate all the residue of such  
income by way of compound interest, by investing the  
same and the resulting income thereof from time to time  
in proper securities, for the benefit of the person who shall  
ultimately become entitled to the property from which such  
accumulations shall have arisen: Provided always, that  
it shall be lawful for such trustees at any time, if it shall  
appear to them expedient, to apply the whole or any part  
of such accumulations as if the same were part of the  
income arising in the then current year.]*

*Compari-  
son of pro-  
visions of  
Lord Cran-  
worth's  
Act and  
the C. A.  
1881.*

*How far  
applicable  
to contin-  
gent in-  
terests.*

The repealed section applied only to instruments dated after 28th August, 1860, while the new one applies to all instruments creating trusts, which do not expressly or by implication exclude it. It will render unnecessary the insertion in wills and settlements of similar provisions for maintenance and accumulation. But the usual power of advancement should be inserted.

<sup>2</sup> It was held that though the corresponding section of Lord Cranworth's Act applied to shares to which infants were contingently entitled (j) it did not authorize the payment by way of maintenance to persons who had attained twenty-one of the income of property to which they were entitled contingently on attaining twenty-five; but that such a payment might be made under the power of advancement (k).

<sup>3</sup> This section has been held not to apply to a legacy to which infants were entitled contingently on an event which might happen *after* they all attained twenty-one (l).

<sup>4</sup> It will be noticed that payment to the parent or guardian is expressly authorised. This will, as to all future payments, preclude the question which arose in *Brophy v. Bellamy* (m).

(j) *Re Cotton*, 1 Ch. D. 232.

(k) *Re Breeds' Will*, 1 Ch. D. 226.

(l) *Re Judkin's Trust*, 28 S. J. 274.

(m) 8 Ch. 798. Compare *Wilson v. Turner*, 22 Ch. D. 521.

<sup>5</sup> This section differs from the s. 26 of Lord Cranworth's Act by authorising payment of the income of the property to which the infant is entitled instead of the income to which the infant is entitled in respect of the property. This will render the decision in *Re George* (n) inapplicable to the new section.

44 & 45  
Vict. c. 41,  
**§ 43.**

<sup>6</sup> It is also more extensive in authorising the application of income for the benefit of the infant as well as for maintenance and education. The word "benefit" will be liberally construed (o).

<sup>7</sup> A direction to accumulate the income of infants' shares is not an expression of a contrary intention so as to prevent the trustees from applying it for the maintenance and education of the infants (p).

## RENTS CHARGE AND OTHER ANNUAL SUMS.

**44.**—(1.) Where a person is entitled to receive out of any land, or out of the income of any land,<sup>1</sup> any annual sum, payable half-yearly or otherwise, whether charged on the land or on the income of the land, and whether by way of rent-charge or otherwise,<sup>2</sup> not being rent incident to a reversion, then, subject and without prejudice to all estates, interests, and rights having priority to the annual sum, the person entitled to receive the same shall have such remedies for recovering and compelling payment of the same as are described in this section, as far as those remedies might have been conferred by the instrument under which the annual sum arises, but not further.

44 & 45  
Vict. c. 41,  
**§ 44.**

Remedies  
for re-  
covery of  
annual  
sums  
charged on  
land.

(2.) If at any time the annual sum or any part thereof is unpaid for twenty-one days next after the time appointed for any payment in respect thereof, the person entitled to receive the annual sum may enter into and distrain on the land charged or any part thereof, and dispose according to law of any distress found, to the intent that thereby or otherwise the annual sum and all arrears thereof, and all costs and expenses occasioned by non-payment thereof, may be fully paid.

Powers of  
distress.

(3.) If at any time the annual sum or any part thereof is unpaid for forty days next after the time appointed for any payment in respect thereof, then, although no legal demand

Power to  
take pos-  
session.

(n) 5 Ch. D. 837.

*Kershaw*, L. R. 6 Eq. 322.

(o) *Lowther v. Bentinck*, L. R. 19 Eq. 166; *Re Breeds' Will*, 1 Ch. D. 226; *Re Long*, 17 W. R. 218; *Re*

(p) *Re Thatcher*, W. N. (1884), 91; 28 S. J. 415.



44 & 45  
Vict. c. 41,  
**§ 44.**

has been made for payment thereof, the person entitled to receive the annual sum may enter into possession of and hold the land charged or any part thereof, and take the income thereof, until thereby or otherwise the annual sum and all arrears thereof due at the time of his entry, or afterwards becoming due during his continuance in possession, and all costs and expenses occasioned by non-payment of the annual sum, are fully paid ; and such possession when taken shall be without impeachment of waste.

Power to  
limit trust  
term.

(4.) In the like case<sup>2</sup> the person entitled to the annual charge, whether taking possession or not, may also by deed demise the land charged, or any part thereof, to a trustee for a term of years, with or without impeachment of waste, on trust, by mortgage, or sale, or demise, for all or any part of the term, of the land charged, or of any part thereof, or by receipt of the income thereof, or by all or any of those means, or by any other reasonable means, to raise and pay the annual sum and all arrears thereof due or to become due, and all costs and expenses occasioned by non-payment of the annual sum, or incurred in compelling or obtaining payment thereof, or otherwise relating thereto, including the costs of the preparation and execution of the deed of demise, and the costs of the execution of the trusts of that deed ; and the surplus, if any, of the money raised, or of the income received, under the trusts of that deed shall be paid to the person for the time being entitled to the land therein comprised in reversion immediately expectant on the term thereby created.

Section  
may be  
excluded.

(5.) This section applies only if and as far as a contrary intention is not expressed in the instrument under which the annual sum arises, and shall have effect subject to the terms of that instrument and to the provisions therein contained.<sup>3</sup>

Not retro-  
spective.

(6.) This section applies only where that instrument comes into operation after the commencement of this Act.

Effect of  
s. 44 on  
future  
instru-  
ments

<sup>1</sup> This section, unless excluded, confers upon persons entitled to rents-charge and other annual payments charged on land or the income of land by instruments *coming into operation* after 31st December, 1881 powers and remedies closely analogous to those usually expressly given for

securing the punctual payment of a rentcharge. In future wills and settlements, therefore, the clauses giving those powers and remedies may be safely omitted. 44 & 45  
Vict. c. 41,  
§ 44.

<sup>2</sup> It will not be necessary even to limit a term to secure the charge, as the person entitled to it may do so under sub-s. 4. The words "in the like case," followed as they are by a reference to taking possession, will probably be construed to refer to the case mentioned in sub-s. 3, namely, where the payments are forty days in arrear, as it is only in that event that a right to take possession is given. limiting  
rents  
charge.

This right to create a term will, of course, render necessary an inquiry as to the existence of any such term in the investigation of the title to any land charged by an instrument to which this section applies.

<sup>3</sup> The section appears to be sufficiently wide to include any annuity charged upon land. It will, therefore, be prudent to exclude or qualify it in all cases where annuitants or other persons entitled to any annual payment charged on land are not intended to have such ample powers. Applies to  
annuities.

#### REDEMPTION OF CHARGES.

**45.**—(1.) Where there is a quitrent, chief-rent, rentcharge, or other annual sum issuing out of land (in this section referred to as the rent), the Copyhold Commissioners<sup>1</sup> shall at any time, on the requisition of the owner of the land, or of any person interested therein, certify the amount of money in consideration whereof the rent may be redeemed. 44 & 45  
Vict. c. 41,  
§ 45.  
Redemp-  
tion of  
quitrents  
and other  
perpetual  
charges.

(2.) Where the person entitled to the rent is absolutely entitled thereto in fee simple in possession, or is empowered to dispose thereof absolutely, or to give an absolute discharge for the capital value thereof, the owner of the land, or any person interested therein, may, after serving one month's notice on the person entitled to the rent, pay or tender to that person the amount certified by the Commissioners.

(3.) On proof to the Commissioners that payment or tender has been so made, they shall certify that the rent is redeemed under this Act; and that certificate shall be final and conclusive, and the land shall be thereby absolutely freed and discharged from the rent.

(4.) Every requisition under this section shall be in writing; and every certificate under this section shall be in writing, sealed with the seal of the Commissioners.

44 & 45  
Vict. c. 41,  
§ 45.

Excep-  
tions.

Not retro-  
spective.

(5.) This section does not apply to tithe rentcharge, or to a rent reserved on a sale or lease, or to a rent made payable under a grant or licence for building purposes, or to any sum or payment issuing out of land not being perpetual.

(6.) This section applies to rents payable at, or created after, the commencement of this Act.

(7.) This section does not extend to Ireland.

<sup>1</sup> The powers and duties of the Copyhold Commissioners are now, by s. 48 of the S. L. A. 1882 (*p*), vested in the Land Commissioners for England, which body consists of the three sets of Commissioners formerly known as the Inclosure, Copyhold, and Tithe Commissioners respectively.

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#### POWERS OF ATTORNEY.<sup>1</sup>

##### DONEE MAY USE OWN NAME.

44 & 45  
Vict. c. 41,  
§ 46.

Donee of  
power of  
attorney  
may use  
own name.

**46.**—(1.) The donee of a power of attorney may, if he thinks fit, execute or do any assurance, instrument, or thing in and with his own name and signature and his own seal, where sealing is required, by the authority of the donor of the power; and every assurance, instrument, and thing so executed and done shall be as effectual in law, to all intents, as if it had been executed or done by the donee of the power in the name and with the signature and seal of the donor thereof.<sup>2</sup>

Retro-  
spective.

(2.) This section applies to powers of attorney created by instruments executed either before or after the commencement of this Act.

<sup>1</sup> By virtue of s. 40 (*q*), a married woman may now give a valid power of attorney.

<sup>2</sup> As to the former rule of law, see *Laurie v. Lees* (*r*).

(*p*) 45 & 46 Vict. c. 38, p. 156, *ante*.

(*r*) 7 Af. Ca. 19.

(*q*) Page 290, *ante*.

VALIDITY OF PAYMENT UNDER POWER OF ATTORNEY.

**47.—(1).—**Any person making or doing any payment or act, in good faith, in pursuance of a power of attorney, shall not be liable in respect of the payment or act by reason that before the payment or act the donor of the power had died or become lunatic, of unsound mind, or bankrupt, or had revoked the power,<sup>2</sup> if the fact of death, lunacy, unsoundness of mind, bankruptcy, or revocation was not at the time of the payment or act known to the person making or doing the same.

44 & 45  
Vict. c. 41,  
**§ 47.**

Payment  
by  
attorney  
under  
power  
without  
notice of  
death, &c.,  
good.

(2.) But this section shall not affect any right against the payee of any person interested in any money so paid; and that person shall have the like remedy against the payee as he would have had against the payer if the payment had not been made by him.<sup>3</sup>

Saving of  
rights  
against  
payee.

(3.) This section applies only to payments and acts made and done after the commencement of this Act.<sup>4</sup>

Not retro-  
spective.

This section confers upon all persons a protection similar to, but more extensive than that given to trustees, executors and administrators by s. 26 of Lord St. Leonards' Act, 1859 (*s*), which is unrepealed and is as follows:—

[26. No trustee, executor, or administrator making any payment or doing any act *bond fide* under or in pursuance of any power of attorney shall be liable for the moneys so paid or the act so done, by reason that the person who gave the power of attorney was dead at the time of such payment or act, or had done some act to avoid the power,<sup>2</sup> provided that the fact of the death, or of the doing of such act as last aforesaid, at the time of such payment or act *bond fide* done as aforesaid by such trustee, executor, or administrator, was not known to him: Provided always, that nothing herein contained shall in any manner affect or prejudice the right of any person entitled to the money against the person to whom such payment shall have been made, but

22 & 23  
Vict. c. 35,  
**§ 26.**

Validity of  
payments  
under  
power of  
attorney  
after  
death of  
party  
giving such  
power,  
under  
Lord St.  
Leonards'  
Act.

(*s*) 22 & 23 Vict. c. 35.

44 & 45  
Vict. c. 41,  
**§ 47.**  
22 & 23  
Vict. c. 35,  
**§ 26.**

that such person so entitled shall have the same remedy against such person to whom such payment shall be made as he would have had against the trustee, executor, or administrator if the money had not been paid away under such power of attorney.]

<sup>1</sup> It will be observed that s. 26 of Lord St. Leonards' Act only applies to death, or the doing of "some act to avoid the power," while s. 47 of the C. A. 1881, is more definite and more extensive, as it applies to death; lunacy, unsoundness of mind, bankruptcy and revocation.

<sup>2</sup> The new provision contains an express saving of the rights of third persons against the person receiving any money, under a revoked power, which the older enactment does not.

<sup>3</sup> The newer and more ample protection is only given to acts and payments subsequent to 31st December, 1881.

The C. A. 1882, contains provisions for giving powers of attorney which are irrevocable, or irrevocable for a fixed time. These are contained in ss. 8 and 9, which are as follows:—

#### IRREVOCABLE POWERS OF ATTORNEY.

45 & 46  
Vict. c. 39,  
**§ 8.**

Effect of  
power of  
attorney,  
for value,  
made  
absolutely  
irrevocable  
under C. A.  
1882.

[8.—(1.) If a power of attorney, given for valuable consideration, is in the instrument creating the power expressed to be irrevocable, then, in favour of a purchaser,—

(i.) The power shall not be revoked at any time, either by anything done by the donor of the power without the concurrence of the donee of the power, or by the death, marriage, lunacy, unsoundness of mind, or bankruptcy of the donor of the power; and

(ii.) Any act done at any time by the donee of the power, in pursuance of the power, shall be as valid as if anything done by the donor of the power without the concurrence of the donee of the power, or the death, marriage, lunacy, unsoundness of mind, or bankruptcy of the donor of the power, had not been done or happened; and

(iii.) Neither the donee of the power nor the purchaser shall at any time be prejudicially affected by notice of anything done by the donor of the power, without

the concurrence of the donee of the power, or of the death, marriage, lunacy, unsoundness of mind, or bankruptcy of the donor of the power.

44 & 45  
Vict. c. 41,  
§ 47.  
45 & 46  
Vict. c. 39,  
§ 8.

(2.) This section applies only to powers of attorney created by instruments executed after the commencement of this Act.<sup>1</sup>]

<sup>1</sup> The commencement of the C. A. 1862, is the 31st of December, 1882.

[9.—(1.) If a power of attorney, whether given for valuable consideration or not, is in the instrument creating the power expressed to be irrevocable for a fixed time therein specified, not exceeding one year from the date of the instrument, then, in favour of a purchaser,—

45 & 46  
Vict. c. 39,  
§ 9.

Effect of  
power of  
attorney,  
for value  
or not,  
made irrevocable for  
fixed time  
under  
C. A. 1882.

(i.) The power shall not be revoked, for and during that fixed time, either by anything done by the donor of the power without the concurrence of the donee of the power, or by the death, marriage, lunacy, unsoundness of mind, or bankruptcy of the donor of the power; and

(ii.) Any act done within that fixed time, by the donee of the power, in pursuance of the power, shall be as valid as if anything done by the donor of the power without the concurrence of the donee of the power or the death, marriage, lunacy, unsoundness of mind, or bankruptcy of the donor of the power, had not been done or happened; and

(iii.) Neither the donee of the power, nor the purchaser shall at any time be prejudicially affected by notice either during or after that fixed time of anything done by the donor of the power during that fixed time, without the concurrence of the donee of the power, or of the death, marriage, lunacy, unsoundness of mind, or bankruptcy of the donor of the power within that fixed time.

(2.) This section applies only to powers of attorney created by instruments executed after the commencement of this Act.<sup>1</sup>]

Not retro-  
spective.

<sup>1</sup> The commencement of the C. A. 1882, is the 31st of December, 1882.

## DEPOSIT OF POWERS OF ATTORNEY.

44 & 45  
Vict. c. 41,  
§ 48.

Deposit of  
original  
instru-  
ments  
creating  
powers of  
attorney.

Office  
copies.

Rules.

Retro-  
spective.

Rule of  
Court  
under C. A.  
1881,  
r. 6.

**48.**—(1.) An instrument creating a power of attorney, its execution being verified by affidavit, statutory declaration, or other sufficient evidence, may, with the affidavit or declaration, if any, be deposited in the Central Office of the Supreme Court of Judicature.

(2.) A separate file of instruments so deposited shall be kept, and any person may search that file, and inspect every instrument so deposited, and an office copy thereof shall be delivered out to him on request.

(3.) A copy of an instrument so deposited may be presented at the office, and may be stamped or marked as an office copy, and when so stamped or marked shall become and be an office copy.

(4.) An office copy of an instrument so deposited shall without further proof be sufficient evidence of the contents of the instrument and of the deposit thereof in the Central Office.

(5.) General rules may be made for purposes of this section, regulating the practice of the Central Office, and prescribing, with the concurrence of the Commissioners of Her Majesty's Treasury, the fees to be taken therein.<sup>1</sup>

(6.) This section applies to instruments creating powers of attorney executed either before or after the commencement of this Act.

<sup>1</sup> Only one rule has been made for the purposes of this section. It forms rule 6 of the R. S. C., December, 1882 (which are not abrogated by the R. S. C. 1883), and is as follows:—

[6. An alphabetical index of the names of the grantors of all powers of attorney filed under s. 48 of the Conveyancing and Law of Property Act, 1881, shall be prepared and kept by the proper officer, and any person may search the index upon payment of the prescribed fee. No person shall take copies of or extracts from any power of attorney or other document filed under that section, and produced for his inspection. All copies or extracts which may be required shall be made by the Office.]

## XII.—CONSTRUCTION AND EFFECT OF DEEDS AND OTHER INSTRUMENTS.

### WORD “GRANT” UNNECESSARY.

**49.**—(1.) It is hereby declared that the use of the word grant<sup>1</sup> is not necessary in order to convey tenements or hereditaments, corporeal or incorporeal.

44 & 45  
Vict. c. 41,  
**§ 49.**

(2.) This section applies to conveyances made before or after the commencement of this Act.

Use of  
word  
“grant”  
unneces-  
sary.

<sup>1</sup> The word “grant” has been almost invariably used in conveyances of freeholds since the passing of the “Act to Amend the Law of Real Property” (*t*).

The unrepealed parts of s. 2 and s. 4 of that Act are as follows:—

[2. That after the said first day of October one thousand eight hundred and forty-five, all corporeal tenements and hereditaments shall, as regards the conveyance of the immediate freehold thereof, be deemed to lie in grant as well as in livery.]

8 & 9 Vict.  
c. 106,  
**§ 2.**

Heredita-  
ments to  
lie in grant.

[4. That a feoffment made after the first day of October one thousand eight hundred and forty-five shall not have any tortious operation; and that an exchange or a partition of any tenements or hereditaments made by deed executed after the said first day of October one thousand eight hundred and forty-five shall not imply any condition in law; and that the word “give” or the word “grant” in a deed executed after the same day shall not imply any covenant in law in respect of any tenements or hereditaments, except so far as the word “give” or the word “grant” may by force of any Act of Parliament imply a covenant.]

8 & 9 Vict.  
c. 106,  
**§ 4.**

Feoffment  
not to  
operate  
tortiously.

“Grant”  
and “Give”  
not to im-  
ply cove-  
nants for  
title.

The word “grant” implies covenants for right to convey, quiet enjoyment and further assurance in conveyances by companies by virtue of s. 132 of the Lands Clauses Consolidation Act, 1845 (*u*). On the other hand, the word “convey” is supposed to have some special

Cases  
where  
“grant”  
implies  
covenants.

(*t*) 8 & 9 Vict. c. 106.

(*u*) 8 & 9 Vict. c. 18.



44 & 45  
Vict. c. 41,  
**§ 49.** efficacy in conveyances to companies—especially by limited owners—by virtue of s. 81 of Schedule A to the same Act. The words “grant, bargain and sale” also amount to express covenants for title in deeds enrolled under 8 Geo. II. c. 6, s. 35.

Although the word “convey” is really sufficient to pass property of any description and may conveniently be used where different kinds of property are assured in a single *testatum*, it is probable that the words “grant and convey” will still usually be used for freeholds alone and the word “assign” for leaseholds and personalty. The words “dispose of” are often used in assurances by married women under the Fines and Recoveries Act. See s. 77 of that Act, p. 364, *post*.

#### CONVEYANCE TO SELF AND OTHERS.

44 & 45  
Vict. c. 41,  
**§ 50.** **50.**—(1.) Freehold land,<sup>1</sup> or a thing in action,<sup>2</sup> may be conveyed by a person to himself jointly with another person, by the like means by which it might be conveyed by him to another person; and may, in like manner, be conveyed by a husband to his wife, and by a wife to her husband, alone or jointly with another person.

Convey-  
ance by a  
person to  
himself,  
&c.

Not retro-  
spective.

(2.) This section applies only to conveyances made after the commencement of this Act.

Same rule  
applies to  
personalty.

<sup>1</sup> This section will enable a grantee to uses to be dispensed with in conveyances on the appointment of new trustees, and in other cases where a conveyance by one person to himself and others jointly are necessary. It applies to freeholds and choses in action a rule similar to that applied to personalty by s. 21 of Lord St. Leonards' Act, 1859 (x), which is still in force, and is as follows:—

23 & 24  
Vict. c. 35,  
**§ 21.**

Assign-  
ment to  
self and  
others.

[21. Any person shall have power to assign personal property now by law assignable,<sup>2</sup> including chattels real, directly to himself and another person or other persons or corporation, by the like means as he might assign the same to another].

A “thing in action” was not “personal property assignable by law” when Lord St. Leonards' Act was passed; but it is so now, by virtue of s. 25 (6) of the Judicature Act, 1873, which is as follows:—

(x) 22 & 23 Vict. c. 35.

[25.—(6.) Any absolute assignment, by writing under the hand of the assignor (not purporting to be by way of charge only), of any debt or other legal chose in action, of which express notice in writing shall have been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be, and be deemed to have been effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed), to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor: Provided always, that if the debtor, trustee, or other person liable in respect of such debt or chose in action shall have had notice that such assignment is disputed by the assignor or any one claiming under him, or of any other opposing or conflicting claims to such debt or chose in action, he shall be entitled, if he think fit, to call upon the several persons making claim thereto to interplead concerning the same, or he may, if he think fit, pay the same into the High Court of Justice under and in conformity with the provisions of the Acts for the relief of trustees].

44 & 45  
Vict. c. 41,  
§ 50.

36 & 37  
Vict. c. 66,  
§ 25 (6)

Assign-  
ment of  
debts and  
chose in  
action  
under  
Jud. Act,  
1873.

#### WORDS OF LIMITATION.

51.—(1.) In a deed it shall be sufficient, in the limitation of an estate in fee simple, to use the words in fee simple, without the word heirs; and in the limitation of an estate in tail, to use the words in tail without the words heirs of the body; and in the limitation of an estate in tail male or in tail female, to use the words in tail male, or in tail female, as the case requires, without the words heirs male of the body, or heirs female of the body.

44 & 45  
Vict. c. 41,  
§ 51.

Words of  
limitation  
in fee or  
in tail

(2.) This section applies only to deeds executed after the commencement of this Act.

Not retro-  
spective.

## RELEASE OF POWERS.

44 & 45  
Vict. c. 41,  
§ 52.

Powers  
simply  
collateral.  
Retrospec-  
tive.

**52.**—(1.) A person to whom any power, whether coupled with an interest or not, is given may by deed release,<sup>1</sup> or contract not to exercise, the power.

(2.) This section applies to powers created by instruments coming into operation either before or after the commencement of this Act.

<sup>1</sup> A somewhat strict construction has been placed upon this section. It has been held that it does not empower trustees to release a power, coupled with a duty (*y*). A power may also be disclaimed under s. 6 of the C. A. 1882 (*z*), which is as follows:—

## DISCLAIMER OF POWERS.

45 & 46  
Vict. c. 39,  
§ 6.

Disclaimer  
of power  
by trustees  
under  
C. A. 1882.

[6.—(1.) A person to whom any power, whether coupled with an interest or not, is given, may, by deed, disclaim the power; and, after disclaimer, shall not be capable of exercising or joining in the exercise of the power.

(2.) On such disclaimer, the power may be exercised by the other or others, or the survivors or survivor of the others, of the persons to whom the power is given, unless the contrary is expressed in the instrument creating the power.<sup>1</sup>

Retrospec-  
tive.

(3.) This section applies to powers created by instruments coming into operation either before or after the commencement of this Act].

<sup>1</sup> This section would probably be held to enable a trustee to disclaim a power coupled with a duty, for in such a case the power could be exercised by the other trustees, if any. If all the trustees disclaimed the power, the question would arise whether new trustees for the purpose of exercising the power could be appointed, on the ground that the disclaiming trustees had become *pro tanto* incapable to act in the trusts. If not, it would appear that a power coupled with a duty may be extinguished by disclaimer, though not by release (*a*). The powers conferred by the S. L. A. cannot be released or disclaimed under this Act. See s. 50 of the S. L. A. (*b*).

(*y*) *Re Eyre*, W. N. (1883) 153.  
Compare *Shirley v. Fisher*, W. N. (1882) 128.

(*z*) 45 & 46 Vict. c. 39.  
(*a*) See *Re Eyre*, W. N. (1883) 153.  
(*b*) 45 & 46 Vict. c. 38, p. 518, *post*.

SUPPLEMENTAL DEED.

**53.**—(1.) A deed expressed to be supplemental<sup>1</sup> to a previous deed, or directed to be read as an annex thereto, shall, as far as may be, be read and have effect as if the deed so expressed or directed were made by way of indorsement on the previous deed, or contained a full recital thereof.

44 & 45  
Vict. c. 41,  
**§ 53.**  
—  
Construc-  
tion of  
supple-  
mental or  
annexed  
deed.

(2.) This section applies to deeds executed either before or after the commencement of this Act.

<sup>1</sup> In many cases, where an indorsed deed would be convenient—*e.g.*, a conveyance in fee on a small purchase, or a re-conveyance on redemption of a mortgage—it is impracticable in consequence of the prior deed not coming into the possession of the person by whom or on whose behalf the draft of the new deed is prepared until after the execution of the latter. A supplemental deed under this section will have the same effect as an indorsed deed in rendering recitals unnecessary; but, unlike an indorsed deed, it is capable of being separated from the previous deed; and if the latter should be lost, the supplemental deed might be rendered unintelligible.

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RECEIPTS IN DEEDS.

**54.**—(1.) A receipt for consideration money or securities in the body of a deed shall be a sufficient discharge for the same to the person paying or delivering the same, without any further receipt for the same being indorsed on the deed.

44 & 45  
Vict. c. 41,  
**§ 54.**  
—  
Receipt in  
deed suffi-  
cient.  
Not retro-  
spective.

(2.) This section applies only to deeds executed after the commencement of this Act.

**55.**—(1.) A receipt for consideration money or other consideration in the body of a deed or indorsed thereon shall, in favour of a subsequent purchaser, not having notice that the money or other consideration thereby acknowledged to be received was not in fact paid or given, wholly or in part, be sufficient evidence of the payment or giving of the whole amount thereof.

44 & 45  
Vict. c. 41,  
**§ 55.**  
—  
Receipt in  
deed or  
indorsed,  
evidence  
for subse-  
quent  
purchaser.  
Not retro-  
spective.

(2.) This section applies only to deeds executed after the commencement of this Act.

## AUTHORITY FOR PAYMENT TO SOLICITOR.

44 & 45  
Vict. c. 41,  
§ 56.

Receipt in  
deed or  
indorsed  
authority  
for pay-  
ment to  
solicitor.

**56.**—(1.) Where a solicitor produces a deed, having in the body thereof or indorsed thereon a receipt for consideration money or other consideration, the deed being executed, or the indorsed receipt being signed, by the person entitled to give a receipt for that consideration, the deed shall be sufficient authority to the person liable to pay or give the same for his paying or giving the same to the solicitor, without the solicitor producing any separate or other direction or authority in that behalf from the person who executed or signed the deed or receipt.<sup>1</sup>

(2.) This section applies only in cases where consideration is to be paid or given after the commencement of this Act.

<sup>1</sup> Where the vendors are trustees the purchaser is still entitled to insist upon payment of the purchase money to them personally, or payment to their joint account at a bank to be named by them in writing, as this section does not enable any person to authorise his solicitor to receive the money who could not previously do so (c).

## FORMS IN FOURTH SCHEDULE.

44 & 45  
Vict. c. 41,  
§ 57.

Sufficiency  
of forms in  
Fourth  
Schedule.

**57.** Deeds in the form of and using the expressions in the forms given in the Fourth Schedule to this Act, or in the like form or using expressions to the like effect, shall, as regards form and expression in relation to the provisions of this Act, be sufficient.<sup>1</sup>

<sup>1</sup> The forms referred to will be found at p. 330, *post*.

## COVENANTS TO EXTEND TO HEIRS.

44 & 45  
Vict. c. 41,  
§ 58.

Covenants  
to extend

**58.**—(1.) A covenant relating to land of inheritance, or devolving on the heir as special occupant, shall be deemed to be made with the covenantee, his heirs and assigns, and shall have effect as if heirs and assigns were expressed.

(c) *Re Bellamy*, 24 Ch. D. 387; *Re Flower*, W. N. (1884), 186.

(2.) A covenant relating to land not of inheritance, or not devolving on the heir as special occupant, shall be deemed to be made with the covenantee, his executors, administrators, and assigns, and shall have effect as if executors, administrators, and assigns were expressed. 44 & 45  
Vict. c. 41,  
**§ 58.**  
to heirs,  
&c.

(3.) This section applies only to covenants made after the commencement of this Act.<sup>1</sup> Not retro-  
spective.

## COVENANTS TO BIND HEIRS.

**59.**—(1.) A covenant, and a contract under seal, and a bond or obligation under seal, though not expressed to bind the heirs, shall operate in law to bind the heirs and real estate, as well as the executors and administrators and personal estate, of the person making the same, as if heirs were expressed. 44 & 45  
Vict. c. 41  
**§ 59.**  
Covenants  
to bind  
heirs, &c.

(2.) This section extends to a covenant implied by virtue of this Act.

(3.) This section applies only if and as far as a contrary intention is not expressed in the covenant, contract, bond, or obligation, and shall have effect subject to the terms of the covenant, contract, bond, or obligation, and to the provisions therein contained. May be  
excluded.

(4.) This section applies only to a covenant, contract, bond, or obligation made or implied after the commencement of this Act.<sup>1</sup> Not retro-  
spective.

<sup>1</sup> Under ss. 58 and 59 it will be sufficient for a covenant to be expressed to be made by A. with B. simply, except in cases where the covenant is intended to be binding on or enforceable by the original covenantor or covenantee only. In such cases, words limiting the operation of the covenant accordingly should be inserted.

## JOINT COVENANTS.

44 & 45  
Vict. c. 41,  
§ 60.

Effect of  
covenant  
with two  
or more  
jointly.

**60.**—(1.) A covenant, and a contract under seal,<sup>1</sup> and a bond or obligation under seal, made with two or more jointly, to pay money or to make a conveyance, or to do any other act, to them or for their benefit, shall be deemed to include, and shall, by virtue of this Act, imply, an obligation to do the act to, or for the benefit of, the survivor or survivors of them, and to, or for the benefit of, any other person to whom the right to sue on the covenant, contract, bond, or obligation devolves.

(2.) This section extends to a covenant implied by virtue of this Act.

May be  
excluded.

(3.) This section applies only if and as far as a contrary intention is not expressed in the covenant, contract, bond, or obligation, and shall have effect subject to the covenant, contract, bond, or obligation, and to the provisions therein contained.

Not retro-  
spective.

(4.) This section applies only to a covenant, contract, bond, or obligation made or implied after the commencement of this Act.

<sup>1</sup> Covenants *under seal* with two or more persons may be considerably shortened in deeds executed after the 31st of December, 1881, by virtue of this section. For instance, a covenant by a mortgagor with two mortgagees to pay principal and interest, may be expressed to be by A. with B. and C. simply.

## ADVANCE ON JOINT ACCOUNT.

44 & 45  
Vict. c. 41,  
§ 61.

Effect of  
advance on  
joint  
account  
&c.

**61.**—(1.) Where in a mortgage, or an obligation for payment of money, or a transfer of a mortgage or of such an obligation, the sum, or any part of the sum, advanced or owing is expressed to be advanced by or owing to more persons than one out of money, or as money, belonging to them on a joint account, or a mortgage, or such an obliga-

tion, or such a transfer is made to more persons than one, jointly, and not in shares, the mortgage money, or other money, or money's worth for the time being due to those persons on the mortgage or obligation, shall be deemed to be and remain money or money's worth belonging to those persons on a joint account, as between them and the mortgagor or obligor; and the receipt in writing of the survivors or last survivor of them, or of the personal representatives of the last survivor, shall be a complete discharge for all money or money's worth for the time being due, notwithstanding any notice to the payer of a severance of the joint account.<sup>1</sup>

<sup>44 & 45  
Vict. c. 41,  
§ 61.</sup>

(2.) This section applies only if and as far as a contrary intention is not expressed in the mortgage, or obligation, or transfer, and shall have effect subject to the terms of the mortgage, or obligation, or transfer, and to the provisions therein contained.

May be  
excluded.

(3.) This section applies only to a mortgage, or obligation or transfer made after the commencement of this Act.

Not retro-  
spective.

<sup>1</sup> The usual declaration that the money belongs to the mortgagees on a joint account, may be omitted in reliance upon this section in mortgages to trustees after 31st December, 1881. This section, unlike s. 60, is not limited to instruments under seal.

## GRANT OF EASEMENT.

**62.**—(1.) A conveyance of freehold land to the use that any person may have, for an estate or interest not exceeding in duration the estate conveyed in the land, any easement, right, liberty, or privilege in, or over, or with respect to that land, or any part thereof, shall operate to vest in possession in that person that easement, right, liberty, or privilege, for the estate or interest expressed to be limited to him; and he, and the persons deriving title under him, shall have, use, and enjoy the same accordingly.

<sup>44 & 45  
Vict. c. 41,  
§ 62.</sup>

Grants of  
easements,  
&c., by  
way of use.

(2.) This section applies only to conveyances made after the commencement of this Act.

Not retro-  
spective.



**"ALL ESTATE" TO PASS BY CONVEYANCE.**

44 & 45  
Vict. c. 41,  
**§ 63.**

Provision  
for all the  
estate, &c.

May be  
excluded.

Not retro-  
spective.

**63.**—(1.) Every conveyance shall, by virtue of this Act, be effectual to pass all the estate, right, title, interest, claim, and demand which the conveying parties respectively have, in, to, or on the property conveyed, or expressed or intended so to be, or which they respectively have power to convey in, to, or on the same.

(2.) This section applies only if and as far as a contrary intention is not expressed in the conveyance, and shall have effect subject to the terms of the conveyance and to the provisions therein contained.

(3.) This section applies only to conveyances made after the commencement of this Act.<sup>1</sup>

<sup>1</sup> In conveyances, dated after 31st December, 1881, the words known as "all the estate clause" will probably be omitted, as they might, indeed, previously have been. The omission of "general words" is also rendered safe by s. 6 (d).

**CONSTRUCTION OF IMPLIED PROVISIONS.**

44 & 45  
Vict. c. 41,  
**§ 64.**

Construc-  
tion of  
implied  
provisions.

**64.** In the construction of a covenant or proviso, or other provision, implied in a deed by virtue of this Act, words importing the singular or plural number, or the masculine gender, shall be read as also importing the plural or singular number, or as extending to females, as the case may require.

**LONG TERMS.**

44 & 45  
Vict. c. 41,  
**§ 65.**

Enlarge-  
ment of

**65.**<sup>1</sup>—(1.) Where a residue unexpired of not less than two hundred years of a term, which, as originally created, was for not less than three hundred years, is subsisting in land, whether being the whole land originally comprised in the

term, or part only thereof, without any trust or right of redemption affecting the term in favour of the freeholder, or other person entitled in reversion expectant on the term, and without any rent, or with merely a peppercorn rent or other rent having no money value, incident to the reversion, or having had a rent, not being merely a peppercorn rent or other rent having no money value,<sup>2</sup> originally so incident, which subsequently has been released, or has become barred by lapse of time, or has in any other way ceased to be payable, then the term may be enlarged into a fee simple in the manner, and subject to the restrictions, in this section provided.

44 & 45  
Vict. c. 41,  
§ 65.

residue of  
long term  
into fee  
simple.

(2.) Each of the following persons (namely):

Who may  
enlarge  
term.

(i.) Any person beneficially entitled in right of the term, whether subject to any incumbrance or not, to possession of any land comprised in the term; but, in case of a married woman, with the concurrence of her husband, unless she is entitled for her separate use, whether with restraint on anticipation or not, and then without his concurrence;

(ii.) Any person being in receipt of income as trustee, in right of the term, or having the term vested in him in trust for sale, whether subject to any incumbrance or not;

(iii.) Any person in whom, as personal representative of any deceased person, the term is vested, whether subject to any incumbrance or not;

shall, as far as regards the land to which he is entitled, or in which he is interested, in right of the term, in any such character as aforesaid, have power by deed to declare to the effect that, from and after the execution of the deed, the term shall be enlarged into a fee simple.

(3.) Thereupon, by virtue of the deed and of this Act, the term shall become and be enlarged accordingly, and the person in whom the term was previously vested shall acquire and have in the land a fee simple instead of the term.

(4.) The estate in fee simple so acquired by enlargement

44 & 45  
Vict. c. 41,  
**§ 65.**

shall be subject to all the same trusts, powers, executory limitations over, rights, and equities, and to all the same covenants and provisions relating to user and enjoyment, and to all the same obligations of every kind, as the term would have been subject to if it had not been so enlarged.

Saving as  
to settle-  
ments.

(5.) But where any land so held for the residue of a term has been settled in trust by reference to other land, being freehold land, so as to go along with that other land as far as the law permits, and, at the time of enlargement, the ultimate beneficial interest in the term, whether subject to any subsisting particular estate or not, has not become absolutely and indefeasibly vested in any person, then the estate in fee simple acquired as aforesaid shall, without prejudice to any conveyance for value previously made by a person having a contingent or defeasible interest in the term, be liable to be, and shall be, conveyed and settled in like manner as the other land, being freehold land, aforesaid, and until so conveyed and settled shall devolve beneficially as if it had been so conveyed and settled.

Mines and  
minerals  
included.

(6.) The estate in fee simple so acquired shall, whether the term was originally created without impeachment of waste or not, include the fee simple in all mines and minerals which at the time of enlargement have not been severed in right, or in fact, or have not been severed or reserved by an inclosure Act or award.

Retro-  
spective.

(7.) This section applies to every such term as aforesaid subsisting at or after the commencement of this Act.

<sup>1</sup> This section is explained by s. 11 of the C. A. 1882 (*e*), which is as follows:—

45 & 46  
Vict. c. 39,  
**§ 11.**

Amend-  
ment of  
enactment

[11. Section sixty-five of the Conveyancing Act, 1881, shall apply to and include, and shall be deemed to have always applied to and included, every such term as in that section mentioned, whether having as the immediate reversion thereon the freehold or not<sup>1</sup>; but not—

(*e*) 45 & 46 Vict. c. 39.

- (i.) Any term liable to be determined by re-entry for condition broken; or 44 & 45  
Vict. c. 41,  
§ 65.
- (ii.) Any term created by sub-demise out of a superior term, itself incapable of being enlarged into a fee simple.] 45 & 46  
Vict. c. 39,  
§ 11.

respecting  
long terms.

<sup>1</sup> Doubts arose whether s. 65 of the C. A. 1881, applied to a derivative term, and whether the conditions prescribed by that section might not be evaded by the creation of a derivative term without any rent having a money value out of a term with a valuable reversion, and the enlargement into a fee simple of the derivative term.

<sup>2</sup> A rent of 3s. per annum was held not to be a rent "having no money value" (*f*).

## ADOPTION OF ACT.

**66.**—(1.) It is hereby declared that the powers given by this Act to any person, and the covenants, provisions, stipulations, and words which under this Act are to be deemed included or implied in any instrument, or are by this Act made applicable to any contract for sale or other transaction, are and shall be deemed in law proper powers, covenants, provisions, stipulations, and words, to be given by or to be contained in any such instrument, or to be adopted in connection with, or applied to, any such contract or transaction; and a solicitor shall not be deemed guilty of neglect or breach of duty, or become in any way liable, by reason of his omitting, in good faith, in any such instrument, or in connection with any such contract or transaction, to negative the giving, inclusion, implication, or application of any of those powers, covenants, provisions, stipulations, or words, or to insert or apply any others in place thereof, in any case where the provisions of this Act would allow of his doing so. 44 & 45  
Vict. c. 41,  
§ 66.  
Protection  
of solicitor  
and  
trustees  
adopting  
Act.

(2.) But nothing in this Act shall be taken to imply that the insertion in any such instrument, or the adoption in connection with, or the application to, any contract or transac-

44 & 45  
Vict. c. 41,  
**§ 66.**

tion, of any further or other powers, covenants, provisions, stipulations, or words is improper.

(3.) Where the solicitor is acting for trustees, executors, or other persons in a fiduciary position, those persons shall also be protected in like manner.

(4.) Where such persons are acting without a solicitor, they shall also be protected in like manner.

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#### MISCELLANEOUS.

#### SERVICE OF NOTICES.

44 & 45  
Vict. c. 41,  
**§ 67.**

**67.**—(1.) Any notice required or authorised by this Act<sup>1</sup> to be served shall be in writing.

Regula-  
tions res-  
pecting  
notice.

(2.) Any notice required or authorised by this Act to be served on a lessee or mortgagor shall be sufficient, although only addressed to the lessee or mortgagor by that designation, without his name, or generally to the persons interested, without any name, and notwithstanding that any person to be affected by the notice is absent, under disability, unborn, or unascertained.

Service of  
notice.

(3.) Any notice required or authorised by this Act to be served shall be sufficiently served if it is left at the last-known place of abode or business in the United Kingdom of the lessee, lessor, mortgagee, mortgagor, or other person to be served, or, in case of a notice required or authorised to be served on a lessee or mortgagor, is affixed or left for him on the land or any house or building comprised in the lease or mortgage, or, in case of a mining lease, is left for the lessee at the office or counting-house of the mine.

By post.

(4.) Any notice required or authorised by this Act to be served shall also be sufficiently served, if it is sent by post in a registered letter addressed to the lessee, lessor, mortgagee, mortgagor, or other person to be served, by name, at the aforesaid place of abode or business, office, or counting-house, and if that letter is not returned through the post-office

undelivered ; and that service shall be deemed to be made at the time at which the registered letter would in the ordinary course be delivered. 44 & 45  
Vict. c. 41,  
§ 67.

(5.) This section does not apply to notices served in proceedings in the Court. Exception.

<sup>1</sup> The following notices are required or authorised by this Act—

(a) Notice under s. 14 to a lessee by a lessor intending to enforce right of re-entry or forfeiture.

(b) Notice under s. 20 (1) to a mortgagor by a mortgagee requiring payment of mortgage money in order to give power to sell under s. 19.

(c) Notice under s. 45 (2) to a person entitled to a rent charge or other annual sum, by the owner of the land intending to redeem.

As to notices served in proceedings in the Court, *e.g.*, on applications by vendor and purchaser, and under s. 5 (2) and (3) on sale freed from incumbrances, see s. 69 (4) (5) (6) (*g.*)

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SHORT TITLE OF 5 & 6 WILL. IV. C. 62.

**68.** The Act described in Part II. of the First Schedule to this Act shall, by virtue of this Act, have the short title of the Statutory Declarations Act, 1835, and may be cited by that short title in any declaration made for any purpose under or by virtue of that Act, or in any other document, or in any Act of Parliament.<sup>1</sup> 44 & 45  
Vict. c. 41,  
§ 68.  
Short title  
of 5 & 6  
Will. IV.  
c. 62.

<sup>1</sup> The full title by which the Statutory Declarations Act, 1835, had previously been known is set out in Part II. of the First Schedule (*h*). It is under s. 18 of that Act that the Statutory Declarations often required to complete or verify titles are made. That section in effect provides that it shall be lawful for any J.P., notary public, or other officer then by law authorised to administer an oath to take the declaration of any person voluntarily making the same in a prescribed form, and that any material falsehood in such a declaration shall be a misdemeanor.

(*g*) Page 320, *post*.

(*h*) Page 326, *post*.

## XVI.—COURT ; PROCEDURE ; ORDERS.

44 & 45  
Vict. c. 41,  
§ 69.

Regula-  
tions re-  
specting  
payments  
into court  
and appli-  
cations.

Service.

Costs.

General  
rules.

Lancaster  
Palatine  
Court.

**69.**—(1.) All matters within the jurisdiction of the Court under this Act shall, subject to the Acts regulating the Court, be assigned to the Chancery Division of the Court.

(2.) Payment of money into Court shall effectually exonerate therefrom the person making the payment.

(3.) Every application to the Court shall, except where it is otherwise expressed, be by summons at chambers.

(4.) On an application by a purchaser notice shall be served in the first instance on the vendor.

(5.) On an application by a vendor notice shall be served in the first instance on the purchaser.

(6.) On any application notice shall be served on such persons, if any, as the Court thinks fit.

(7.) The Court shall have full power and discretion to make such order as it thinks fit respecting the costs, charges, or expenses of all or any of the parties to any application.

(8.) General rules for purposes of this Act shall be deemed rules of Court within section seventeen of the Appellate Jurisdiction Act, 1876, and may be made accordingly.<sup>1</sup>

(9.) The powers of the Court may, as regards land in the County Palatine of Lancaster, be exercised also by the Court of Chancery of the County Palatine ; and rules for regulating proceedings in that Court shall be from time to time made by the Chancellor of the Duchy of Lancaster, with the advice and consent of a judge of the High Court acting in the Chancery Division, and of the Vice-Chancellor of the County Palatine.

(10.) General rules, and rules of the Court of Chancery of the County Palatine, under this Act may be made at any time after the passing of this Act, to take effect on or after the commencement of this Act.

<sup>1</sup> Only one rule has been made under this sub-section, namely, that set out in the notes to s. 48, p. 304, *ante*.

As to applications in the Queen's Bench Division under s. 14, see notes thereto, p. 239, *ante*.

ORDERS OF COURT CONCLUSIVE.

**70.**—(1.) An order of the Court under any statutory or other jurisdiction shall not as against a purchaser, be invalidated on the ground of want of jurisdiction, or of want of any concurrence, consent, notice, or service, whether the purchaser has notice of any such want or not.

44 & 45  
Vict. c. 41,  
**§ 70.**  
Orders of  
Court con-  
clusive.

(2.) This section shall have effect with respect to any lease, sale, or other act under the authority of the Court, and purporting to be in pursuance of the Settled Estates Act, 1877, notwithstanding the exception in section forty of that Act, or to be in pursuance of any former Act repealed by that Act, notwithstanding any exception in such former Act.

40 & 41  
Vict. c. 18,  
s. 40.

(3.) This section applies to all orders made before or after the commencement of this Act, except any order which has before the commencement of this Act been set aside or determined to be invalid on any ground, and except any order as regards which an action or proceeding is at the commencement of this Act pending for having it set aside or determined to be invalid.

Retro-  
spective.

<sup>1</sup> Where an order for sale under the Settled Estates Act, 1877, did not follow the provisions of that Act, and the purchaser objected to the title on the ground that the order on the face of it was irregular, the Court of Appeal held that under this section the purchaser had, in any event, a good title, inasmuch as this section is applicable whether the objection to the order appears on the face of it or not (i).

REPEALS.

**71.**—(1.) The enactments described in Part III. of the Second Schedule to this Act are hereby repealed.<sup>1</sup>

44 & 45  
Vict. c. 41,  
**§ 71.**

(2.) The repeal by this Act of any enactment shall not affect the validity or invalidity, or any operation, effect, or consequence,<sup>2</sup> of any instrument executed or made, or of

Repeal of  
enact-  
ments in

(i) *Re Hall Dare's Contract*, 21 Ch. D. 41.



44 & 45  
Vict. c. 41,  
§ 71.

Part III.  
of Second  
Schedule;  
restriction  
on all  
repeals.

anything done or suffered, before the commencement of this Act, or any action, proceeding, or thing then pending or uncompleted; and every such action, proceeding, and thing may be carried on and completed as if there had been no such repeal in this Act;<sup>3</sup> but this provision shall not be construed as qualifying the provision of this Act relating to section forty of the Settled Estates Act, 1877, or any former Act repealed by that Act.<sup>4</sup>

Enact-  
ments  
repealed.

<sup>1</sup> The enactments repealed by this section are Lord Brougham's Act (*k*), which enabled short forms to be used to imply covenants for title, and Parts II. and III. of Lord Cranworth's Act (*l*). Parts I. and IV. of Lord Cranworth's Act have since been repealed by s. 64 of the S. L. A. 1882 (*m*). Other enactments repealed by the C. A. 1881 are ss. 4 to 9 of Lord St. Leonards' Act, 1859 (*n*), by s. 14 (7); s. 2 of the C. L. P. Act, 1860 (*o*), by s. 14 (7); and s. 48 of the Chancery Procedure Act, 1852 (*p*), by s. 25 (6).

Effect of  
repeals.

<sup>2</sup> The repeals of Part III. of Lord Cranworth's Act and of portions of Lord St. Leonards' Act create no difficulty, as the C. A. 1881 contains new provisions similar to, but more extensive than, those in the repealed sections, and the sections containing such new provisions apply to deeds executed before, as well as after, the 1st of January, 1882. In future cases where it is desired to exercise any of the powers contained in the repealed sections, the powers of the C. A. 1881 may therefore be exercised instead. But, for many future years, it may be necessary to decide, on investigation of titles, whether or not powers conferred by the repealed enactments have, in past years, been validly exercised. For this reason, as well as in order to facilitate the comparison of the old and new provisions, reference to the repealed provisions will often be necessary. The repeals of Lord Brougham's Act and Part II. of Lord Cranworth's Act stand upon a different footing. The former (which was passed on 8th August, 1845) enabled full covenants for title to be implied by the use of a short specified form of words, and also enabled general words to be implied, while the latter conferred powers of sale and other powers on mortgagees under all mortgages executed between 28th August, 1860, and 1st January, 1882, which did not contain a declaration to the contrary (*q*). The C. A. 1881 certainly contains fuller substituted provisions, but such provisions apply only to instruments dated after 31st

(*k*) 8 & 9 Vict. c. 119.  
(*l*) 23 & 24 Vict. c. 145.  
(*m*) 45 & 46 Vict. c. 38.  
(*n*) 22 & 23 Vict. c. 35.

(*o*) 23 & 24 Vict. c. 126.  
(*p*) 15 & 16 Vict. c. 86.  
(*q*) Section 32.

December, 1881. The question therefore arises, what is the effect of 44 & 45 s. 71 of the C. A. 1881, upon a conveyance executed between 1845 and 1882, from which general words and full covenants for title have been omitted, in reliance upon Lord Brougham's Act, or upon a mortgage executed between August 1860 and 1882, from which the usual mortgagee's powers have been omitted, in reliance upon Part II. of Lord Cranworth's Act. As Lord Brougham's Act has been seldom, if ever, acted upon, the question is not of so much practical importance with regard to that Act as with regard to Lord Cranworth's Act which has undoubtedly been, to some extent, relied upon. It seems clear to the writer that any deed executed before 1882 in reliance upon either of the repealed enactments—*e.g.*, a mortgage dated between August 1860 and 1882, containing no power of sale—must be construed as if the covenants or powers implied by the Act had been inserted in express words in the deed. Such would certainly have been the "operation" and "effect" of the deed and the "consequence" of omitting the clauses before the commencement of the C. A. 1881, and it will be observed that the saving clause of s. 71 provides in effect that such "operation, effect, or consequence" shall not be affected by any repeal by the C. A. 1881. The powers conferred by Part II. of Lord Cranworth's Act may therefore still be exercised by certain mortgagees under mortgages executed between 1860 and 1882, while the powers conferred by s. 19 of the C. A. 1881 may be exercised by those whose mortgages have been executed since 31st December, 1881.

44 & 45  
Vict. c. 41,  
§ 71.  
How far  
repealed  
enact-  
ments still  
in force.

<sup>a</sup> The words relating to pending proceedings and things, seem especially to refer to proceedings between landlord and tenant with regard to forfeiture and re-entry (*r*); but of course they are not limited to such proceedings.

<sup>b</sup> See C. A. 1881, s. 70 (2) (*s*).

## IRELAND.

**72.—(1.)** In the application of this Act to Ireland the foregoing provisions shall be modified as in this section provided.

44 & 45  
Vict. c. 41,  
§ 72.

(2.) The Court shall be Her Majesty's High Court of Justice in Ireland.

Modifica-  
tions re-  
specting  
Ireland.

(3.) All matters within the jurisdiction of that Court shall

(*r*) *Quilter v. Mapleson*, 9 Q. B. D. 672.      (*s*) Page 321, *ante*.

<sup>44 & 45</sup>  
<sup>Vict. c. 41,</sup>  
**§ 72.** subject to the Acts regulating that Court, be assigned to the Chancery Division of that Court; but general rules under this Act may direct that any of those matters be assigned to the land judges of that division.

(4.) The proper office of the Supreme Court of Judicature in Ireland shall be substituted for the central office of the Supreme Court of Judicature.

<sup>40 & 41</sup>  
<sup>Vict. c. 57,</sup>  
<sup>s. 69.</sup> (5.) General rules for purposes of this Act for Ireland shall be deemed rules of Court within the Supreme Court of Judicature Act (Ireland), 1877, and may be made accordingly, at any time after the passing of this Act, to take effect on or after the commencement of this Act.

<sup>44 & 45</sup>  
<sup>Vict. c. 41,</sup>  
**§ 73.** **73.**—(1.) Section five of the Vendor and Purchaser Act, 1874, is hereby repealed from and after the commencement of this Act, as regards cases of death thereafter happening; and section seven of the Vendor and Purchaser Act, 1874, is hereby repealed as from the date at which it came into operation.<sup>1</sup>

Death of  
bare  
trustee  
intestate,  
&c.

<sup>37 & 38</sup>  
<sup>Vict. c. 78</sup>

(2.) This section extends to Ireland only.

<sup>1</sup> See notes to ss. 5 and 7 of the V. and P. Act, 1874 (*t*).

## SCHEDULES.

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### THE FIRST SCHEDULE.

#### ACTS AFFECTED.<sup>1</sup>

##### PART I.

- 1 & 2 Vict. c. 110.—An Act for abolishing arrest on mesne process in civil actions, except in certain cases; for extending the remedies of creditors against the property of debtors; and for amending the laws for the relief of insolvent debtors in England.
- 2 & 3 Vict. c. 11.—An Act for the better protection of purchasers against judgments, crown debts, *lis pendens*, and fiats in bankruptcy.
- 18 & 19 Vict. c. 15.—An Act for the better protection of purchasers against judgments, crown debts, cases of *lis pendens*, and life annuities or rentcharges.
- 22 & 23 Vict. c. 35.—An Act to further amend the law of property and to relieve trustees.
- 23 & 24 Vict. c. 38.—An Act to further amend the law of property.
- 23 & 24 Vict. c. 115.—An Act to simplify and amend the practice as to the entry of satisfaction on Crown debts and on judgments.
- 27 & 28 Vict. c. 112.—An Act to amend the law relating to future judgments, statutes and recognizances.
- 28 & 29 Vict. c. 104.—The Crown Suits, &c., Act, 1865.
- 31 & 32 Vict. c. 54.—The Judgments Extension Act, 1868.

## PART II.

5 & 6 Will. IV. c. 62.—An Act to repeal an Act of the present session of Parliament, intituled “An Act for the more effectual abolition of oaths and affirmations taken and made in various departments of the State, and to substitute declarations in lieu thereof; and for the more entire suppression of voluntary and extra-judicial oaths and affidavits;” and to make other provisions for the abolition of unnecessary oaths.

<sup>1</sup> The Acts mentioned in Part I. of this Schedule are not “affected” by the C. A. 1881, but by s. 2 of the C. A. 1882 (*u*).

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THE SECOND SCHEDULE.

## REPEALS.

A description or citation of a portion of an Act is inclusive of the words, section, or other part, first or last mentioned, or otherwise referred to as forming the beginning, or as forming the end, of the portion comprised in the description or citation.

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PART I.

22 & 23 Vict. c. 35. in part.	An Act to further amend the law of property and to relieve trustees . . . Sections four to nine.	} in part; namely,—
23 & 24 Vict. c. 126. in part.	The Common Law Procedure Act, 1860 . . . Section two.	

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PART II.

15 & 16 Vict. c. 86. in part.	An Act to amend the practice and course of proceeding in the High Court of Chancery . . . Section forty-eight.	} in part; namely,—

(*u*) Page 335, *post*.

## PART III.

8 & 9 Vict. c. 119.	An Act to facilitate the conveyance of real property .	
23 & 24 Vict. c. 145.	An Act to give to trustees, mortgagees, and others certain powers now commonly inserted in settlements, mortgages, and wills . . . . .	} in part; namely,—
in part.		
	Parts II. and III (sections eleven to thirty).	

## THE THIRD SCHEDULE.

## STATUTORY MORTGAGE.

## PART I.

*Deed of Statutory Mortgage.*

THIS INDENTURE made by way of statutory mortgage the day of 1882 between *A.* of [*&c.*] of the one part and *M.* of [*&c.*] of the other part WITNESSETH that in consideration of the sum of £ now paid to *A.* by *M.* of which sum *A.* hereby acknowledges the receipt *A.* as mortgagor and as beneficial owner hereby conveys to *M.* All that [*&c.*] To hold to and to the use of *M.* in fee simple for securing payment on the day of 1883 of the principal sum of £ as the mortgage money with interest thereon at the rate of [*four*] per centum per annum.

In witness &c.

*\*.\* Variations in this and subsequent forms to be made, if required, for leasehold land, or other matter.*

## PART II.

## (A.)

*Deed of Statutory Transfer, Mortgagor not joining.*

THIS INDENTURE made by way of statutory transfer of mortgage the            day            1883 between *M.* of [*&c.*] of the one part and *T.* of [*&c.*] of the other part supplemental to an indenture made by way of statutory mortgage dated the day of            1882 and made between [*&c.*] WITNESSETH that in consideration of the sum of £            now paid to *M.* by *T.* being the aggregate amount of £            mortgage money and £            interest due in respect of the said mortgage of which sum *M.* hereby acknowledges the receipt *M.* as mortgagee hereby conveys and transfers to *T.* the benefit of the said mortgage.

In witness &c.

## (B.)

*Deed of Statutory Transfer, a Covenantor joining.*

THIS INDENTURE made by way of statutory transfer of mortgage the            day of            1883 between *A.* of [*&c.*] of the first part *B.* of [*&c.*] of the second part and *C.* of [*&c.*] of the third part supplemental to an indenture made by way of statutory mortgage dated the            day of            1882 and made between [*&c.*] WITNESSETH that in consideration of the sum of £            now paid to *A.* by *C.* being the mortgage money due in respect of the said mortgage no interest being now due and payable thereon of which sum *A.* hereby acknowledges the receipt *A.* as mortgagee with the concurrence of *B.* who joins herein as covenantor hereby conveys and transfers to *C.* the benefit of the said mortgage.

In witness &c.

## (C.)

*Statutory Transfer and Statutory Mortgage combined.*

THIS INDENTURE made by way of statutory transfer of mortgage and statutory mortgage the            day of            1883 between *A.* of [*&c.*] of the first part *B.* of [*&c.*] of the second part

and *C.* of [*&c.*] of the third part supplemental to an indenture made by way of statutory mortgage dated the            day of 1882 and made between [*&c.*] WHEREAS the principal sum of £            only remains due in respect of the said mortgage as the mortgage money and no interest is now due and payable thereon And whereas *B.* is seised in fee simple of the land comprised in the said mortgage subject to that mortgage Now THIS INDENTURE WITNESSETH that in consideration of the sum of £            now paid to *A.* by *C.* of which sum *A.* hereby acknowledges the receipt and *B.* hereby acknowledges the payment and receipt as aforesaid\* *A.* as mortgagee hereby conveys and transfers to *C.* the benefit of the said mortgage AND THIS INDENTURE ALSO WITNESSETH that for the same consideration *A.* as mortgagee and according to his estate and by direction of *B.* hereby conveys and *B.* as beneficial owner hereby conveys and confirms to *C.* All that [*&c.*] To hold to and to the use of *C.* in fee simple for securing payment on the            day of            1882 of† the sum of £            as the mortgage money with interest thereon at the rate of [*four*] per centum per annum.

In witness &c.

[*Or in case of further advance after aforesaid at \* insert and also in consideration of the further sum of £            now paid by C. to B. of which sum B. hereby acknowledges the receipt, and after of at † insert the sums of £            and £            making together*]

\*.\* Variations to be made, as required in case of the deed being made by indorsement, or in respect of any other thing.

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### PART III.

#### *Deed of Statutory Re-Conveyance of Mortgage.*

THIS INDENTURE made by way of statutory re-conveyance of mortgage the            day of            1884 between *C.* of [*&c.*] of the one part and *B.* of [*&c.*] of the other part supplemental to an indenture made by way of statutory transfer of mortgage dated the            day of            1883 and made between [*&c.*] WITNESSETH that in consideration of all principal money and interest due under that indenture having been paid of which principal and interest *C.* hereby acknowledges the receipt *C.* as mort-



gagee hereby conveys to *B.* all the lands and hereditaments now vested in *C.* under the said indenture To hold to and to the use of *B.* in fee simple discharged from all principal money and interest secured by and from all claims and demands under the said indenture.

In witness &c.

\*.\* *Variations as noted above.*

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## THE FOURTH SCHEDULE

### SHORT FORMS OF DEEDS.

#### I.—*Mortgage.*

THIS INDENTURE OF MORTGAGE made the       day of 1882 between *A.* of [*&c.*] of the one part and *B.* of [*&c.*] and *C.* of [*&c.*] of the other part WITNESSETH that in consideration of the sum of £       paid to *A.* by *B.* and *C.* out of money belonging to them on a joint account of which sum *A.* hereby acknowledges the receipt *A.* hereby covenants with *B.* and *C.* to pay to them on the       day of       1882 the sum of £       with interest thereon in the meantime at the rate of [*four*] per centum per annum and also as long after that day as any principal money remains due under this mortgage to pay to *B.* and *C.* interest thereon at the same rate by equal half-yearly payments on the       day of       and the       day of       AND THIS INDENTURE ALSO WITNESSETH that for the same consideration *A.* as beneficial owner hereby conveys to *B.* and *C.* All that [*&c.*] To hold to and to the use of *B.* and *C.* in fee simple subject to the proviso for redemption following (namely) that if *A.* or any person claiming under him shall on the       day of       1882 pay to *B.* and *C.* the sum of £       and interest thereon at the rate aforesaid then *B.* and *C.* or the persons claiming under them will at the request and cost of *A.* or the persons claiming under him re-convey the premises to *A.* or the persons claiming under him AND *A.* hereby covenants with *B.* as follows [*here add covenant as to fire insurance or other special covenant required*].

In witness &c.

II.—*Further Charge.*

THIS INDENTURE made the                      day of                      18  
between [*the same parties as the foregoing mortgage*] and supple-  
mental to an indenture of mortgage dated the                      day of  
18                      and made between the same parties for securing the sum of  
£                      and interest at [*four*] per centum per annum on property at  
[&c.] WITNESSETH that in consideration of the further sum of  
£                      paid to *A.* by *B.* and *C.* out of money belonging to them on  
a joint account [*add receipt and covenant as in the foregoing mort-*  
*gage*] and further that all the property comprised in the before-  
mentioned indenture of mortgage shall stand charged with the pay-  
ment to *B.* and *C.* of the sum of £ .                      and the interest thereon  
hereinbefore covenanted to be paid as well as the sum of £  
and interest secured by the same indenture.

In witness &c.

III.—*Conveyance on Sale.*

THIS INDENTURE made the                      day of                      1883  
between *A.* of [&c.] of the first part *B.* of [&c.] of the second part  
and *M.* of [&c.] of the third part WHEREAS by an indenture  
dated [&c.] and made between [&c.] the lands hereinafter men-  
tioned were conveyed by *A.* to *B.* and *C.* in fee simple by way of  
mortgage for securing £                      and interest and by a supplemental  
indenture dated [&c.] and made between the same parties those  
lands were charged by *A.* with the payment to *B.* and *C.* of the  
further sum of £                      and interest thereon AND WHEREAS a prin-  
cipal sum of £                      remains due under the two before-mentioned  
indentures but all interest thereon has been paid as *B.* and *C.*  
hereby acknowledge NOW THIS INDENTURE WITNESSETH that in  
consideration of the sum of £                      paid by the direction of *A.* to  
*B.* and *C.* and of the sum of £                      paid to *A.* those two sums making  
together the total sum of £                      paid by *M.* for the purchase of the  
fee simple of the lands hereinafter mentioned of which sum of £  
*B.* and *C.* hereby acknowledge the receipt and of which total sum

of £      *A.* hereby acknowledges the payment and receipt in manner before-mentioned *B.* and *C.* as mortgagees and by the direction of *A.* as beneficial owner hereby convey and *A.* as beneficial owner hereby conveys and confirms to *M.* ALL that [*&c.*] To hold to and to the use of *M.* in fee simple discharged from all money secured by and from all claims under the before-mentioned indentures [*Add if required* And *A.* hereby acknowledges the right of *M.* to the production of the documents of title mentioned in the Schedule hereto and to delivery of copies thereto and hereby undertakes for the safe custody thereof].

In witness &c.

[The Schedule above referred to      *To contain list of documents retained by A.*]

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#### IV.—*Marriage Settlement.*

THIS INDENTURE made the      day of      1882 between *John M.* of [*&c.*] of the first part *Jane S.* of [*&c.*] of the second part and *X.* of [*&c.*] and *Y.* of [*&c.*] the third part WITNESSETH that in consideration of the intended marriage between *John M.* and *Jane S.* *John M.* as settlor hereby conveys to *X.* and *Y.* ALL that [*&c.*] To hold to *X.* and *Y.* in fee simple to the use of *John M.* in fee simple until the marriage and after the marriage to the use of *John M.* during his life without impeachment of waste with remainder after his death to the use that *Jane S.* if she survives him may receive during the rest of her life a yearly jointure rentcharge of £      to commence from his death and to be paid by equal half-yearly payments the first thereof to be made at the end of six calendar months from his death if she is then living or if not a proportional part to be paid at her death and subject to the before-mentioned rentcharge to the use of *X.* and *Y.* for a term of five hundred years without impeachment of waste on the trusts hereinafter declared and subject thereto to the use of the first and other sons of *John M.* and *Jane S.* successively according to seniority in tail male with remainder [*insert here if thought desirable* to the use of the same first and other sons successively according to seniority in tail with remainder] to the use of all the daughters of

*John M. and Jane S. in equal shares as tenants in common in tail with cross-remainders between them in tail with remainder to the use of John M. in fee simple [insert trusts of term of five hundred years for raising portions also if required power to charge jointure and portions on a future marriage also powers of sale exchange and partition and other powers and provisions if and as desired].*

In witness &c.

## THE CONVEYANCING ACT, 1882.

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45 & 46 VICT. C. 39.

*An Act for further improving the Practice of Conveyancing;  
and for other purposes.*

Be it enacted, &c.

### PRELIMINARY.

45 & 46  
Vict. c. 39,  
**§ 1.**  
Short  
titles;  
commence-  
ment;  
extent;  
interpreta-  
tion.  
44 & 45  
Vict. c. 41.

**1.**—(1.) This Act may be cited as the Conveyancing Act, 1882; and the Conveyancing and Law of Property Act, 1881 (in this Act referred to as the Conveyancing Act of 1881); and this Act may be cited together as the Conveyancing Acts, 1881, 1882.

(2.) This Act, except where it is otherwise expressed, shall commence and take effect from and immediately after the thirty-first day of December one thousand eight hundred and eighty-two, which time is in this Act referred to as the commencement of this Act.

(3.) This Act does not extend to Scotland.

(4.) In this Act and in the Schedule thereto—

(i.) Property includes real and personal property, and any debt, and any thing in action, and any other right or interest in the nature of property, whether in possession or not ;

(ii.) Purchaser includes a lessee or mortgagee, or an intending purchaser, lessee, or mortgagee, or other person, who, for valuable consideration, takes or deals for property, and purchase has a meaning corresponding with that of purchaser ;

- (iii.) The Act of the session of the third and fourth years of King William the Fourth (chapter seventy-four) "for the abolition of Fines and Recoveries, and for the substitution of more simple modes of Assurance," is referred to as the Fines and Recoveries Act; and the Act of the session of the fourth and fifth years of King William the Fourth (chapter ninety-two) "for the abolition of Fines and Recoveries, and for the substitution of more simple modes of Assurance in Ireland," is referred to as the Fines and Recoveries (Ireland) Act.

45 & 46  
Vict. c. 39,  
§ 1.  
Short  
titles of  
3 & 4 Will.  
IV. c. 74,  
and  
4 & 5 Will.  
IV. c. 92.

SEARCHES.

2.—(1.) Where any person requires, for purposes of this section, search to be made in the central office of the Supreme Court of Judicature for entries of judgments, deeds, or other matters or documents, whereof entries are required or allowed to be made in that office by any Act described in Part I. of the First Schedule to the Conveyancing Act of 1881,<sup>1</sup> or by any other Act, he may deliver in the office a requisition in that behalf,<sup>2</sup> referring to this section.

45 & 46  
Vict. c. 39,  
§ 2.  
Official  
negative  
and other  
certificates  
of searches  
for judgments,  
crown  
debts, &c.

(2.) Thereupon the proper officer shall diligently make the search required, and shall make and file in the office a certificate<sup>3</sup> setting forth the result thereof; and office copies of that certificate shall be issued on requisition, and an office copy shall be evidence of the certificate.

(3.) In favour of a purchaser, as against persons interested under or in respect of judgments, deeds, or other matters or documents, whereof entries are required or allowed as aforesaid, the certificate, according to the tenour thereof, shall be conclusive, affirmatively or negatively, as the case may be.

(4.) Every requisition under this section shall be in writing, signed by the person making the same, specifying the name against which he desires search to be made, or in relation to which he requires an office copy certificate of result of search,

<sup>45 & 46</sup>  
<sup>Vict. c. 39,</sup>  
**§ 2.** and other sufficient particulars; and the person making any such requisition shall not be entitled to a search, or an office copy certificate, until he has satisfied the proper officer that the same is required for the purposes of this section.<sup>4</sup>

**Rules.** (5.) General rules shall be made for purposes of this section, prescribing forms and contents of requisitions and certificates, and regulating the practice of the office, and prescribing, with the concurrence of the Commissioners of Her Majesty's Treasury, the fees to be taken therein; which rules shall be deemed rules of Court within section seventeen of the Appellate Jurisdiction Act, 1876, as altered by section nineteen of the Supreme Court of Judicature Act, 1881, and may be made, at any time after the passing of this Act, to take effect on or after the commencement of this Act.<sup>5</sup>

**Frauds.** (6.) If any officer, clerk, or person employed in the office commits, or is party or privy to, any act of fraud or collusion, or is wilfully negligent, in the making of or otherwise in relation to any certificate or office copy under this section, he shall be guilty of a misdemeanour.

**Right of independent search.** (7.) Nothing in this section or in any rule made thereunder shall take away, abridge, or prejudicially affect any right which any person may have independently of this section to make any search in the office; and every such search may be made as if this section or any such rule had not been enacted or made.<sup>6</sup>

**Protection of persons taking certificates of search.** (8.) Where a solicitor obtains an office copy certificate of result of search under this section, he shall not be answerable in respect of any loss that may arise from error in the certificate.<sup>7</sup>

(9.) Where the solicitor is acting for trustees, executors, agents, or other persons in a fiduciary position, those persons also shall not be so answerable.<sup>7</sup>

(10.) Where such persons obtain such an office copy without a solicitor, they shall also be protected in like manner.<sup>7</sup>

(11.) Nothing in this section applies to deeds inrolled

under the Fines and Recoveries Act, or under any other Act, <sup>45 & 46</sup> or under any statutory rule. <sup>Vict. c. 39,</sup>  
**§ 2.**

(12.) This section does not extend to Ireland.

<sup>1</sup> Part I. of the First Schedule to the C. A. 1881 is as follows:—

[1 & 2 Vict. c. 110.—An Act for abolishing arrest on mesne process in civil actions, except in certain cases; for extending the remedies of creditors against the property of debtors; and for amending the laws for the relief of insolvent debtors in England. First Schedule to C. A. 1881.

2 & 3 Vict. c. 11.—An Act for the better protection of purchasers against judgments, Crown debts, *lis pendens*, and fiats in bankruptcy.

18 & 19 Vict. c. 15.—An Act for the better protection of purchasers against judgments, Crown debts, cases of *lis pendens*, and life annuities or rentcharges.

22 & 23 Vict. c. 35.—An Act to further amend the law of property and to relieve trustees.

23 & 24 Vict. c. 38.—An Act to further amend the law of property.

23 & 24 Vict. c. 115.—An Act to simplify and amend the practice as to the entry of satisfaction on Crown debts and on judgments.

27 & 28 Vict. c. 112.—An Act to amend the law relating to future judgments, statutes, and recognisances.

28 & 29 Vict. c. 104.—The Crown Suits, &c., Act, 1865.

31 & 32 Vict. c. 54.—The Judgments Extension Act, 1868.]

<sup>2</sup> For forms of requisition, see p. 338, *post*.

<sup>3</sup> For forms of certificate, see p. 341, *post*.

<sup>4</sup> See form of declaration, p. 338, *post*, which *may* be accepted as sufficient evidence that the search is required for the purposes of this section, and *is*, in practice, so accepted.

<sup>5</sup> The following rules have been made for the purposes of this section. They form a portion of the Rules of the Supreme Court, December, 1882:—

[1. Every requisition for an official search shall state the name and address of the person requiring the search to be made. Every requisition and certificate shall be filed in the office where the search was made.] Rules as to searches under C. A. 1882, s. 2.

[2. Every person requiring an official search to be made pursuant to section 2 of the Conveyancing Act, 1882, shall deliver to the officer a declaration according to the Forms I. and II. in the Appendix, purporting to be signed by the person requiring the search to be made, or by a solicitor, which declaration may be accepted by the officer as sufficient evidence that the search is required for the purposes of the said section. The declaration may be made in the requisition, or in a separate document.]

[3. Requisitions for searches under section 2 of the Conveyancing Act, 1882, shall be in the Forms III. to VI. in the Appendix, and the



45 & 46  
Vict. c. 39,  
**§ 2.**

certificates of the results of such searches shall be in the Forms VII. to X., with such modifications as the circumstances may require.]

[4. Where a certificate setting forth the result of a search in any name has been issued, and it is desired that the search be continued in that name, to a date not more than one calendar month subsequent to the date of the certificate, a requisition in writing in the Form XI. in the Appendix may be left with the proper officer, who shall cause the search to be continued, and the result of the continued search shall be indorsed on the original certificate and upon any office copy thereof which may have been issued, if produced to the officer for that purpose. The indorsement shall be in the Form XII. in the Appendix, with such modifications as circumstances require.]

[5. Every person shall upon payment of the prescribed fee be entitled to have a copy of the whole or any part of any deed or document enrolled in the Enrolment Department of the Central Office.]

The forms referred to in these rules are as follows:—

#### FORM I.

##### DECLARATION BY SEPARATE INSTRUMENT AS TO PURPOSES OF SEARCH.

Supreme Court of Judicature,  
Central Office.  
To the Clerk of Enrolments  
or The Registrar of  
Royal Courts of Justice,  
London.

In the matter of *A.B. and C.D.*

I declare that the search (*or searches*) in the name (*or names*) of required to be made by the requisition for search, dated the is (*or are*) required for the purposes of a sale (*or mortgage, or lease, or as the case may be*), by *A.B. to C.D.*

Signature,  
Address, and  
Description }

Dated

#### FORM II.

##### DECLARATION AS TO PURPOSES OF SEARCH CONTAINED IN THE REQUISITION.

I declare that the above-mentioned search is required for the purposes of a sale (*or mortgage, or lease, or as the case may be*), by *A.B. to C.D.*

#### FORM III.

##### REQUISITION FOR SEARCH IN THE ENROLMENT OFFICE, UNDER THE CONVEYANCING ACT, 1882, S. 2.

Supreme Court of Judicature,  
Central Office.  
Requisition for Search.  
To the Clerk of Enrolments,  
Royal Courts of Justice,  
London.

In the matter of *A.B. and C.D.*

Pursuant to section 2 of the Conveyancing Act, 1882, search for deeds and other documents enrolled during the period from 18 to 18 both inclusive, in the following name (*or names*).

Surname.	Christian Name or Names.	Usual or last known Place of Abode.	Title, Trade or Profession.

45 & 46  
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§ 2.

(Add declaration, Form II.)

(State if an office copy of the certificate is desired, and whether it is to be sent by post or called for.)

Signature, address, and  
description of person  
requiring the search. }

Dated

FORM IV.

REQUISITION FOR SEARCH IN THE BILLS OF SALE DEPARTMENT UNDER  
THE CONVEYANCING ACT, 1882, s. 2.

Supreme Court of Judicature,  
Central Office.  
Requisition for Search.  
To the Registrar of Bills of Sale,  
Royal Courts of Justice,  
London.

In the Matter of A.B. and C.D.  
Pursuant to section 2 of the Conveyancing Act, 1882, search for instruments  
registered or re-registered as bills of sale during the period from  
18 to 18 both inclusive in the following name (or names).

Surname.	Christian Name or Names.	Usual or last known Place of Abode.	Title, Trade, or Profession.

(Add Declaration, Form II.)

(State if an office copy of the certificate is desired, and whether it is to be sent by post or called for.)

Signature, address, and  
description of person  
requiring the search. }

Dated

45 & 46  
Vict. c. 39,  
§ 2.

FORM V.

REQUISITION FOR SEARCH IN THE REGISTRY OF CERTIFICATES OF ACKNOWLEDGMENTS OF DEEDS BY MARRIED WOMEN UNDER THE CONVEYANCING ACT, 1882, s. 2.

Supreme Court of Judicature,  
Central Office.  
Requisition for Search.  
To the Registrar of Certificates of Acknowledgments of Deeds by Married Women,  
Royal Courts of Justice,  
London.

In the Matter of *A.B.* and *C.D.*  
Pursuant to section 2 of the Conveyancing Act, 1882, search for Certificates of Acknowledgments of Deeds by Married Women during the period from 18 to 18, both inclusive, according to the particulars mentioned in the schedule hereto.

THE SCHEDULE.

Surname.	Christian Name or Names of Wife and Husband.	Date of Certificate if the Search relates to a particular Certificate.	Date of Deed if the Search relates to a particular Deed.	County, Parish, or Place in which the Property is situate, or other description of the Property.

(Add declaration, Form II.)

(State if an office copy of the certificate is desired, and whether it is to be sent by post or called for.)

Dated  
Signature, address, and description of person requiring the search. }

FORM VI.

REQUISITION FOR SEARCH IN THE REGISTRY OF JUDGMENTS UNDER THE CONVEYANCING ACT, 1882, s. 2.

Supreme Court of Judicature,  
Central Office.  
Requisition for Search.  
To the Registrar of Judgments,  
Royal Courts of Justice,  
London.

In the Matter of *A.B.* and *C.D.*  
Pursuant to section 2 of the Conveyancing Act, 1882, search for judgments, revivals, decrees, orders, rules, and lis pendens, and for judgments at the suit of the Crown, statutes, recognisances, Crown bonds, inquisitions, and

acceptances of office for the period from 18 to 18, 45 & 46  
both inclusive, and for executions for the period from the 29th July, 1864 Vict. c. 39,  
(or as the case may require) to the 18, both inclusive, and § 2.  
for annuities for the period from the 26th April, 1855 (or as the case may  
require) to the 18, both inclusive, in the following name (or names).

Surname.	Christian Name or Names.	Usual or last known Place of Abode.	Title, Trade or Profession.

(Add declaration, Form II.)  
(State if an office copy of the certificate is desired, and whether it is to be sent by  
post or called for.)  
Signature, address, and }  
description of person }  
requiring the search. }

Dated

FORM VII.

CERTIFICATE OF SEARCH BY ENROLMENT DEPARTMENT UNDER THE  
CONVEYANCING ACT, 1882, s. 2.

Supreme Court of Judicature,  
Central Office,  
Enrolment Department.

Certificate of Search pursuant to section 2 of the Conveyancing Act, 1882.  
In the Matter of A.B. and C.D.

This is to certify that a search has been diligently made in the Enrolment  
Office for deeds and other documents in the name (or names) of  
for the period from to , both inclusive, and  
that no deed or other document has been enrolled in the said office in that  
name (or in any one or more of those names) during the period aforesaid.  
or and that except the described in the schedule hereto no deed or  
document has been enrolled in that name (or in any one or more of those  
names) during the period aforesaid.

THE SCHEDULE.

Dated

FORM VIII.

CERTIFICATE OF SEARCH BY THE REGISTRAR OF BILLS OF SALE UNDER  
THE CONVEYANCING ACT, 1882.

Supreme Court of Judicature,  
Central Office,  
Bills of Sale Department.

Certificate of Search pursuant to section 2 of the Conveyancing Act, 1882.

In the Matter of A.B. and C.D.

This is to certify that a search has been diligently made in the Register of

45 & 46 Bills of Sale in the name (or names) of for the period from  
Vict. c. 39, 18 to 18 , both inclusive, and that no instrument has been  
§ 2. registered or re-registered as a bill of sale in that name (or in any one or more  
of those names) during that period,  
or, and that except the described in the schedule hereto, no  
instrument has been registered or re-registered as a bill of sale in that name  
(or in any one or more of those names) during the period aforesaid.

THE SCHEDULE.

Dated

FORM IX.

CERTIFICATE OF SEARCH BY REGISTRAR OF CERTIFICATES OF ACKNOWLEDG-  
MENTS OF DEEDS BY MARRIED WOMEN UNDER THE CONVEYANCING ACT,  
1882, s. 2.

Supreme Court of Judicature,  
Central Office.

Registry of Certificates of Acknowledgments of Deeds by Married Women.  
Certificate of Search pursuant to section 2 of the Conveyancing Act, 1882.  
In the Matter of A.B. and C.D.

This is to certify that a search has been diligently made in the Office of the  
Registrar of Certificates of Acknowledgments of Deeds by Married Women  
in the name (or names) of for the period from to  
18 , both inclusive,  
for a certificate dated the or for certificates of  
acknowledgment of a deed dated the  
or for certificates of acknowledgments of deeds relating to (fill in the  
description of the property from the Requisition)  
and that no such certificate has been filed in that name (or in any one or  
more of those names) during the period aforesaid.  
or and that except the certificate (or certificates) described in the schedule  
hereto, no such certificate has been filed in that name (or in any one or more  
of those names) during the period aforesaid.

Surname.	Christian Names of Wife and Husband.	Date of Certificate.	Date of Deed.	County, Parish or Place in which property situated, or other descrip- tion of the property.

Dated day of 188 .

FORM X.

CERTIFICATE OF SEARCH BY REGISTRAR OF JUDGMENTS UNDER CONVEY-  
ANCING ACT 1882, s. 2.

Supreme Court of Judicature,  
Central Office.  
The Registry of Judgments.

Certificate of Search pursuant to section 2 of the Conveyancing Act, 1882.

In the matter of *A.B.* and *C.D.*

45 & 46  
Vict. c. 39,  
**§ 2.**

This is to certify that a search has been diligently made in the Office of the Registrar of Judgments for judgments, revivals, decrees, orders, rules, lis pendens, judgments at the suit of the Crown, statutes, recognisances, Crown bonds, inquisitions, and acceptances of office, for the period from 18 to 18, both inclusive, and for executions for the period from 18 to 18, both inclusive, and for annuities for the period from to 18, both inclusive, in the name (*or names*) of and that no judgment, revival, decree, order, rule, lis pendens, judgment at the suit of the Crown, statute, recognisances, Crown bond, inquisition, acceptance of office, execution, or annuity, has been registered or re-registered in that name (*or in any one or more of those names*) during the respective periods covered by the aforesaid searches.

*or*, and that except the mentioned in the schedule hereto, no judgment, revival, decree, order, rule, lis pendens, judgment at the suit of the Crown, statute, recognisance, Crown bond, inquisition, acceptance of office, execution, or annuity has been registered or re-registered in that name (*or in any one or more of those names*) during the respective periods covered by the aforesaid search.

THE SCHEDULE.

Dated the day of 188 .

FORM XI.

REQUISITION FOR CONTINUATION OF SEARCH UNDER THE CONVEYANCING ACT, 1882.

Supreme Court of Judicature,  
Central Office.

Requisition for continuation of Search.

To the Clerk of Enrolments,  
*or* The Registrar of  
Royal Courts of Justice,  
London, W.C.

In the Matter of *A.B.* and *C.D.*

Pursuant to section 2 of the Conveyancing Act, 1882, continue the search for [ ], made pursuant to the requisition dated the day of 18, in the name (*or names*) of , from the day of to the day of 18, both inclusive.

Signature, address, and  
description of person  
requiring the search. }

Dated

FORM XII.

CERTIFICATE OF RESULT OF CONTINUED SEARCH UNDER THE CONVEYANCING ACT, 1882, s. 2, TO BE INDORSED ON ORIGINAL CERTIFICATE.

This is to certify that the search (*or searches*) mentioned in the within written certificate has (*or have*) been diligently continued to the day of 18, and that up to and including that date [except the mentioned in the schedule hereto (*these words to be omitted where nothing is found*)], no deed or other document has been enrolled, or no instrument has been registered, or re-registered, as a bill of sale, or no certificate has been filed, or no judgment, revival, decree, order, rule, lis pendens, judgment at the suit of the Crown, statute, recognisance, Crown

45 & 46  
Vict. c. 39, § 2. bond, inquisition. acceptance of office, execution or annuity, has been registered or re-registered in the within-mentioned name (or in any one or more of the within-mentioned names).  
Dated

The following are the fees prescribed by the Rules made in December, 1882, in respect of searches and inspection under s. 2 of the C. A. 1882:—

	£	s.	d.
For an official certificate of the result of a search in one name in any register or index under the custody of the Clerk of Enrolments, the Registrar of Bills of Sale, the Registrar of Certificates of Acknowledgments of Deeds by Married Women, or the Registrar of Judgments, if not more than five folios . . . . .	0	5	0
For every additional folio . . . . .	0	0	6
For every additional name, if included in the same certificate . . . . .	0	2	0
For an office copy of the certificate of search, if not more than three folios . . . . .	0	1	0
For every additional folio . . . . .	0	0	6
For a continuation search, if made within one calendar month of date of official certificate (the result to be indorsed on such certificate) . . . . .	0	1	0

<sup>6</sup> It will be observed that a purchaser or mortgagee is not bound to rely upon a certificate under this section, but may, if he prefers, have an independent search made by his solicitor.

<sup>7</sup> See and compare s. 66 of the C. A. 1881 (a).

NOTICE.

45 & 46  
Vict. c. 39, § 3. Restriction on constructive notice.

3.—(1.) A purchaser shall not be prejudicially affected by notice of any instrument, fact, or thing, unless—

(i.) It is within his own knowledge, or would have come to his knowledge if such inquiries and inspections had been made as ought reasonably to have been made by him; or

(ii.) In the same transaction with respect to which a question of notice to the purchaser arises, it has come to the knowledge of his counsel, as such, or of his solicitor, or other agent, as such, or would have come to the knowledge of his solicitor, or other

(a) P. 317, ante.

agent, as such, if such inquiries and inspections had been made as ought reasonably to have been made by the solicitor or other agent. 45 & 46  
Vict. c. 39,  
**§ 3.**

(2.) This section shall not exempt a purchaser from any liability under, or any obligation to perform or observe, any covenant, condition, provision, or restriction contained in any instrument under which his title is derived, mediately or immediately; and such liability or obligation may be enforced in the same manner and to the same extent as if this section had not been enacted. Saving as  
to obliga-  
tions  
under title  
deeds.

(3.) A purchaser shall not by reason of anything in this section be affected by notice in any case where he would not have been so affected if this section had not been enacted. Exception.

(4.) This section applies to purchases made either before or after the commencement of this Act; save that, where an action is pending at the commencement of this Act, the rights of the parties shall not be affected by this section.<sup>1</sup> How far  
retrospec-  
tive.

<sup>1</sup> As to the law applicable to the excepted cases, see Dart, V. & P. 5th ed. pp. 857 *et seq.*, and cases there cited.

## LEASES.

**4.**—(1.) Where a lease is made under a power contained in a settlement, will, Act of Parliament, or other instrument, any preliminary contract for or relating to the lease shall not, for the purpose of the deduction of title to an intended assign, form part of the title, or evidence of the title to the lease.<sup>1</sup> 45 & 46  
Vict. c. 39,  
**§ 4.**  
Contract  
for lease  
not part of  
title to  
lease.

(2.) This section applies to leases made either before or after the commencement of this Act.

<sup>1</sup> See title "Rights under Open Contract" under s. 2 of the V. & P. Act, 1874 (b).

(b) 37 & 38 Vict. c. 78, p. 192, *ante*.



## SEPARATE TRUSTEES.

45 & 46  
Vict. c. 39,  
§ 5.

Appoint-  
ment of  
separate  
sets of  
trustees.

Retro-  
spective.

**5.**—(1.) On an appointment of new trustees, a separate set of trustees may be appointed for any part of the trust property held on trusts distinct from those relating to any other part or parts of the trust property; or, if only one trustee was originally appointed, then one separate trustee may be so appointed for the first-mentioned part.<sup>1</sup>

(2.) This section applies to trusts created either before or after the commencement of this Act.

<sup>1</sup> See notes to s. 31 of the C. A. 1881 (c).

## DISCLAIMER OF POWERS.

45 & 46  
Vict. c. 39,  
§ 6.

Disclaimer  
of power  
by trustees.

Retro-  
spective.

**6.**—(1.) A person to whom any power, whether coupled with an interest or not, is given, may by deed disclaim the power; and, after disclaimer, shall not be capable of exercising or joining in the exercise of the power.

(2.) On such disclaimer, the power may be exercised by the other or others, or the survivors or survivor of the others, of the persons to whom the power is given, unless the contrary is expressed in the instrument creating the power.

(3.) This section applies to powers created by instruments coming into operation either before or after the commencement of this Act.<sup>1</sup>

<sup>1</sup> See notes to s. 52 of the C. A. 1881 (d).

## MARRIED WOMEN.

45 & 46  
Vict. c. 39,  
§ 7.

Acknow-  
ledgment  
of deeds by  
married  
women.

**7.**—(1.) In section seventy-nine of the Fines and Recoveries Act, and section seventy of the Fines and Recoveries (Ireland) Act, there shall, by virtue of this Act, be substituted for the words "two of the perpetual commissioners, or two special commissioners," the words "one of the perpetual commissioners, or one special commissioner;" and in section eighty-

(c) P. 276, *ante*.

(d) P. 308, *ante*.

three of the Fines and Recoveries Act, and section seventy-four of the Fines and Recoveries (Ireland) Act, there shall, by virtue of this Act, be substituted for the words "persons" the word "person," and for the word "commissioners" the words "a commissioner;" and all other provisions of those Acts, and all other enactments having reference in any manner to the sections aforesaid, shall be read and have effect accordingly.

45 & 46  
Vict. c. 39,  
§ 7.

(2.) Where the memorandum of acknowledgment by a married woman of a deed purports to be signed by a person authorised to take the acknowledgment, the deed shall as regards the execution thereof by the married woman, take effect at the time of acknowledgment, and shall be conclusively taken to have been duly acknowledged.

Memoran-  
dum  
conclusive  
evidence  
of due  
acknow-  
ledgment.

(3.) A deed acknowledged before or after the commencement of this Act by a married woman, before a judge of the High Court of Justice in England or Ireland, or before a judge of a county court in England, or before a chairman in Ireland, or before a perpetual commissioner or a special commissioner, shall not be impeached or impeachable by reason only that such judge, chairman, or commissioner was interested or concerned either as a party, or as solicitor, or clerk to the solicitor for one of the parties, or otherwise, in the transaction giving occasion for the acknowledgment; and General Rules shall be made for preventing any person interested or concerned as aforesaid from taking an acknowledgment; but no such Rule shall make invalid any acknowledgment; and those Rules shall, as regards England, be deemed Rules of Court within section seventeen of the Appellate Jurisdiction Act, 1876, as altered by section nineteen of the Supreme Court of Judicature Act, 1881, and shall, as regards Ireland, be deemed Rules of Court within the Supreme Court of Judicature Act (Ireland), 1877, and may be made accordingly, for England and Ireland respectively, at any time after the passing of this Act, to take effect on or after the commencement of this Act.

Acknow-  
ledgments  
before  
persons  
interested  
in trans-  
action.

39 & 40  
Vict. c. 59.  
44 & 45  
Vict. c. 68.  
40 & 41  
Vict. c. 57.

(4.) The enactments described in the Schedule to this Act are hereby repealed.

Repeals.

45 & 46  
Vict. c. 39,  
§ 7.

Section  
not retro-  
spective.

Official  
index to  
certifi-  
cates.

Office copy  
certificate.

(5.) The foregoing provisions of this section, including the repeal therein, apply only to the execution of deeds by married women after the commencement of this Act.

(6.) Notwithstanding the repeal or any other thing in this section, the certificate, if not lodged before the commencement of this Act, of the taking of an acknowledgment by a married woman of a deed executed before the commencement of this Act, with any affidavit relating thereto, shall be lodged, examined, and filed in the like manner and with the like effects and consequences as if this section had not been enacted.

(7.) There shall continue to be kept in the proper office of the Supreme Court of Judicature an index to all certificates of acknowledgments of deeds by married women lodged therein, before or after the commencement of this Act, containing the names of the married women and their husbands, alphabetically arranged, and the dates of the certificates and of the deeds to which they respectively relate, and other particulars found convenient; and every such certificate lodged after the commencement of this Act shall be entered in the index as soon as may be after the certificate is filed.

(8.) An office copy of any such certificate filed before or after the commencement of this Act shall be delivered to any person applying for the same; and every such office copy shall be received as evidence of the acknowledgment of the deed to which the certificate refers.

For the rules made pursuant to this section see notes to s. 5 of the M. W. P. A. 1882 (*d*), where s. 79 of the F. & R. A. is also dealt with.

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#### IRREVOCABLE POWERS OF ATTORNEY.

45 & 46  
Vict. c. 39,  
§ 8.

Effect of  
power of

8.—(1.) If a power of attorney, given for valuable consideration, is in the instrument creating the power expressed to be irrevocable, then, in favour of a purchaser,—

(i.) The power shall not be revoked at any time, either by

(*d*) P. 373, *post*.

anything done by the donor of the power without the concurrence of the donee of the power, or by the death, marriage, lunacy, unsoundness of mind, or bankruptcy of the donor of the power; and

45 & 46  
Vict. c. 39,  
§ 8.

(ii.) Any act done at any time by the donee of the power, in pursuance of the power, shall be as valid as if anything done by the donor of the power without the concurrence of the donee of the power, or the death, marriage, lunacy; unsoundness of mind, or bankruptcy of the donor of the power, had not been done or happened; and

attorney,  
for value,  
made  
absolutely  
irrevoc-  
able.

(iii.) Neither the donee of the power nor the purchaser shall at any time be prejudicially affected by notice of anything done by the donor of the power, without the concurrence of the donee of the power, or of the death, marriage, lunacy, unsoundness of mind, or bankruptcy of the donor of the power.

(2.) This section applies only to powers of attorney created by instruments executed after the commencement of this Act.

Not retro-  
spective.

See s. 47 of the C. A. 1881 and notes thereto, p. 302, *ante*.

#### LIMITED IRREVOCABLE POWERS OF ATTORNEY.

9.—(1.) If a power of attorney, whether given for valuable consideration or not, is in the instrument creating the power expressed to be irrevocable for a fixed time therein specified, not exceeding one year from the date of the instrument, then, in favour of a purchaser,—

45 & 46  
Vict. c. 39,  
§ 9.

Effect of  
power of  
attorney,  
for value or  
not, made  
irrevocable  
for fixed  
time.

(i.) The power shall not be revoked, for and during that fixed time, either by anything done by the donor of the power without the concurrence of the donee of the power, or by the death, marriage, lunacy, unsoundness of mind, or bankruptcy of the donor of the power; and

(ii.) Any act done within that fixed time, by the donee of

45 & 46  
Vict. c. 39,  
**§ 9.**

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the power, in pursuance of the power, shall be as valid as if anything done by the donor of the power without the concurrence of the donee of the power, or the death, marriage, lunacy, unsoundness of mind, or bankruptcy of the donor of the power, had not been done or happened ; and—

- (iii.) Neither the donee of the power, nor the purchaser, shall at any time be prejudicially affected by notice either during or after that fixed time of anything done by the donor of the power during that fixed time, without the concurrence of the donee of the power, or of the death, marriage, lunacy, unsoundness of mind, or bankruptcy of the donor of the power within that fixed time.

Not retro-  
spective.

(2.) This section applies only to powers of attorney created by instruments executed after the commencement of this Act.

See s. 47 of the C. A. 1881 and notes thereto, p. 303, *ante*.

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#### EXECUTORY LIMITATIONS.

45 & 46  
Vict. c. 39,  
**§ 10.**

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Restric-  
tion on  
executory  
limita-  
tions.

**10.**—(1.) Where there is a person entitled to land for an estate in fee, or for a term of years absolute or determinable on life, or for term of life, with an executory limitation over on default or failure of all or any of his issue, whether within or at any specified period or time or not, that executory limitation shall be or become void and incapable of taking effect, if and as soon as there is living any issue who has attained the age of twenty-one years, of the class on default or failure whereof the limitation over was to take effect.

Not retro-  
spective.

(2.) This section applies only where the executory limitation is contained in an instrument coming into operation after the commencement of this Act.

LONG TERMS.

**11.** Section sixty-five of the Conveyancing Act of 1881 shall apply to and include, and shall be deemed to have always applied to and included, every such term as in that section mentioned, whether having as the immediate reversion thereon the freehold or not; but not—

45 & 46  
Vict. c. 39,  
**§ 11.**

Amend-  
ment of  
enactment  
respecting  
long terms.

(i.) Any term liable to be determined by re-entry for condition broken; or

(ii.) Any term created by sub-demise out of a superior term, itself incapable of being enlarged into a fee simple.

See s. 65 of the C. A. 1881 and notes thereto (e).

MORTGAGES.

**12.** The right of the mortgagor, under section fifteen of the Conveyancing Act of 1881, to require a mortgagee, instead of re-conveying, to assign the mortgage debt and convey the mortgaged property to a third person, shall belong to and be capable of being enforced by each incumbrancer, or by the mortgagor, notwithstanding any intermediate incumbrance; but a requisition of an incumbrancer shall prevail over a requisition of the mortgagor, and, as between incumbrancers, a requisition of a prior incumbrancer shall prevail over a requisition of a subsequent incumbrancer.

45 & 46  
Vict. c. 39,  
**§ 12.**

Reconvey-  
ance on  
mortgage.

See s. 15 of the C. A. 1881 (f).

SAVING CLAUSE.

**13.** The repeal by this Act of any enactment shall not affect any right accrued or obligation incurred thereunder before the commencement of this Act; nor shall the same

45 & 46  
Vict. c. 39,  
**§ 13.**

Restric-  
tion on

(e) P. 316, *ante*.

(f) P. 244, *ante*.

45 & 46  
Vict. c. 39,  
**§ 13.**

repeals in  
this Act.

affect the validity or invalidity, or any operation, effect, or consequence, of any instrument executed or made, or of any thing done or suffered, before the commencement of this Act; nor shall the same affect any action, proceeding, or thing then pending or uncompleted; and every such action, proceeding, and thing may be carried on and completed as if there had been no such repeal in this Act.

Compare s. 71 of the C. A. 1881, and see notes thereto (*g*).

### SCHEDULE.

Section 7  
(4).

#### REPEALS.

3 & 4 Will. IV. c. 74. in part.	-	The Fines and Recoveries Act - in part; namely,— Section eighty-four, from and including the words “and the same judge,” to the end of that section. Sections eighty-five to eighty-eight, in- clusive.
4 & 5 Will. IV. c. 92. in part.	-	The Fines and Recoveries (Ireland) Act - in part; namely,— Section seventy-five, from and including the words “and the same judge,” to the end of that section. Sections seventy-six to seventy-nine, in- clusive.
17 & 18 Vict. c. 75.	-	An Act to remove doubts concerning the due acknowledgments of deeds by married women in certain cases.
41 & 42 Vict. c. 23.	-	The Acknowledgment of Deeds by Married Women (Ireland) Act, 1878.

(*g*) P. 322, *ante*.

# THE MARRIED WOMEN'S PROPERTY ACT, 1882,

AS AMENDED BY

THE MARRIED WOMEN'S PROPERTY ACT, 1884,

WITH PORTIONS OF

## THE FINES AND RECOVERIES ACT.

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45 & 46 Vict. c. 75.  
47 & 48 Vict. c. 14.  
8 & 4 Will. IV., c. 74.

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45 & 46 VICT. c. 75.

*An Act to consolidate and amend the Acts relating to the  
Property of Married Women.*

WHEREAS it is expedient to consolidate and amend the Act of the thirty-third and thirty-fourth Victoria, chapter ninety-three, intituled "The Married Women's Property Act, 1870," and the Act of the thirty-seventh and thirty-eighth Victoria, chapter fifty, intituled "An Act to amend the Married Women's Property Act (1870)":

45 & 46  
Vict. c. 75.  
Preamble.

Be it enacted, &c.

1.—(1.) A married woman shall, in accordance with the provisions of this Act, be capable of acquiring, holding, and disposing by will or otherwise, of any real or personal property as her separate property, in the same manner as if she were a *feme sole*, without the intervention of any trustee.<sup>1</sup>

45 & 46  
Vict. c. 75,  
§ 1.

(2.) A married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract,<sup>2</sup> and of suing and being sued,<sup>3</sup> either in contract or in tort,<sup>4</sup> or otherwise, in all respects as if she were a *feme sole*, and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding brought by or taken against her<sup>5</sup>; and any damages or costs recovered by

Married  
woman to  
be capable  
of holding  
property  
and of  
contract-  
ing as a  
*feme sole*.



45 & 46  
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§ 1.

her in any such action or proceeding shall be her separate property; and any damages or costs recovered against her in any such action or proceeding shall be payable out of her separate property, and not otherwise.

(3.) Every contract entered into by a married woman shall be deemed to be a contract entered into by her with respect to and to bind her separate property, unless the contrary be shown.<sup>6</sup>

(4.) Every contract entered into by a married woman with respect to and to bind her separate property shall bind not only the separate property which she is possessed of or entitled to at the date of the contract, but also all separate property which she may thereafter acquire.<sup>7</sup>

(5.) Every married woman carrying on a trade separately from her husband shall, in respect of her separate property, be subject to the bankruptcy laws in the same way as if she were a *feme sole*.<sup>8</sup>

Equitable  
doctrine of  
separate  
use.

<sup>1</sup> Hitherto a married woman could have no legal estate, except in investments, under the M. W. P. A. 1870, even in property belonging to her for her separate use. The separate use was the creation of a Court of Equity, and conferred only an equitable estate. Where property was conveyed or devised to a married woman for her separate use, without the intervention of any trustee, the legal estate vested in her and her husband jointly, and he was, in equity, a trustee for her.

Meaning of  
"separate  
property"  
in this Act.

Whether the effect of s. 1 (1) of the M. W. P. A. 1882, is to enable a married woman to acquire, hold, and dispose of the legal as well as the equitable estate in her "separate property," or whether the scope and effect of the whole Act is merely to annex the equitable incident of the separate use to all unsettled property which married women may hereafter acquire, leaving the legal estate in their husbands, is a question which the Court will probably be called upon to decide. In the M. W. P. A. 1870, the various expressions "property held and settled to her separate use," "belong to the woman for her separate use," and "to be the separate property of such woman," are to be found. In the M. W. P. A. 1882, the words "separate property" and "separate estate" are used throughout, and in s. 13 a distinction seems to be drawn between "separate property" under that Act and the "separate use" in property under the former Acts. This renders it difficult to argue that "separate property" in this Act is merely equivalent to "property settled to her separate use;" and it would be a narrow construction of an enabling Act to restrict the power of holding and disposing as a *feme sole* to the equitable estate, especially having regard to the words "without the intervention of any trustee." On the other hand, the wording of sub-s. 1, when compared

with the emphatic "*in all respects as if she were a feme sole*" of sub-s. 2, is calculated to give rise to doubt, and it is to be regretted that sub-s. 1 is not more clearly expressed. The only judicial opinions which have been pronounced on it are as follows: "In my opinion the Act was not intended to alter any rights, except those *inter se* of husband and wife." *Per* COTTON, L.J. (h). "Her *status* is changed, and she is made capable of acquiring *personal* property as if she were a *feme sole*." *Per* CHITTY, J. (i). It would seem to follow that the effect of the sub-section as to *real* estate is the same. If so, a woman married after 1st January, 1883, simply retains under s. 2 the legal estate in all property belonging to her as if she had remained unmarried, whether such property be real or personal. A woman married before 1883 will acquire, under s. 5, the legal estate in all property—real or personal—which may devolve upon her after 1st January, 1883, if no trustee has been appointed. And it remains to be seen whether the words "in accordance with the provisions of this Act," in s. 1 (1), will have the effect of preventing a woman, whether married before or after 1883, from calling upon any person who holds real or personal property in trust for her, absolutely for her separate use, without restraint on alienation, to assure to her the legal estate in such property. See note to s. 5 as to property belonging to women married before 1883 and not settled to their separate use.

45 & 46  
Vict. c. 75,  
**§ 1.**

Legal  
estate of a  
married  
woman  
in her  
separate  
property.

<sup>2</sup> It will be observed that the capability of entering into contracts conferred upon a married woman is only in respect of her separate estate. As to property which is not her separate property, either under this Act or otherwise, she is incapable of entering into any binding contract, and the Court will not enforce specific performance either against her or her heir of a contract to sell or settle such property (j), whether the contract is entered into by her husband alone (k) or she concurs therein (l), even though she may have entered into the contract pursuant to the order of a Court of Equity (m), unless the contract is evidenced by some instrument executed pursuant to the F. and R. A., as to which see note 3 to s. 5, page 362, *post*. But she may enter into a binding compromise in relation to such property with the sanction of a Court of Equity (n). And, as it is a maxim that those who seek equity must do equity, she will not be allowed to assert her equity to a settlement as against an innocent purchaser for value who has been misled by her fraud (o).

Power of  
married  
women to  
contract.

Power of  
married  
women to  
compro-  
mise.

Where a married woman concurs with her husband in mortgaging property not settled to her separate use to secure the husband's debt, she is treated as a surety only. If such mortgage be of a reversionary

Where  
wife surety  
for  
husband's  
debt.

(h) *Re March, Mander v. Harris*, 32 W. R. 941.

(i) *Re March, Mander v. Harris*, 24 Ch. D. 222, 229.

(j) *Avery v. Griffin*, L. R. 6 Eq. 606.

(k) *Barnes v. Wood*, L. R. 8 Eq. 424.

(l) *Castle v. Wilkinson*, L. R. 5 Ch. 534.

(m) *Field v. Moore*; *Field v. Brown*, 7 L. M. G. 691.

(n) *Wall v. Rogers*, L. R. 9 Eq. 58.

(o) *Sharpe v. Foy*, L. R. 4 Ch. 35;  
*Re Lush's Trusts*, L. R. 4 Ch. 591;  
*Cooke v. Williams*, 11 W. R. 504.

45 & 46  
Vict. c. 75,  
§ 1.

Contracts  
by married  
women  
bind their  
separate  
estate.

interest, the mortgagee cannot enforce his security until it falls into possession, unless the terms of the deed expressly authorise him to do so (*p*); and where a decree for judicial separation was made before a reversionary interest so mortgaged fell into possession, the married woman was held entitled to it as against the mortgagee (*q*).

The provision that a married woman shall be capable of rendering herself liable in respect of her separate property on any contract is founded upon the rule which has hitherto prevailed in equity that the general engagements of a married woman may be enforced against her separate estate (*r*), especially if she held herself out as a *feme sole*, or a woman who had separate property (*s*), or if her engagements were such that they could only be satisfied by resorting to her separate estate (*t*), as when money to pay for board, lodging, and other necessities was lent to a married woman living apart from her husband; and it would seem that the claim of her creditors is not barred by the Statutes of Limitation as against property held in trust for her separate use (*u*). Creditors may also proceed against her separate estate after her death; and before the M. W. P. A. 1882, her executor had no right of retainer, her property being necessarily equitable assets (*x*); but if a married woman has, under this Act, the legal estate in her separate property, the right of retainer would seem to arise.

Wife con-  
tracting as  
agent for  
husband.

Presump-  
tion of  
authority  
to bind  
husband  
may be  
rebutted.

Although under this section every contract of a married woman is *prima facie* with intent to bind her separate estate, the question must often arise, whether goods ordered by her, or contracts entered into by her, are so ordered or entered into on her own account or as agent for her husband. Where she has authority, express or implied, to pledge his credit, and does not expressly contract on the credit of her separate estate, the husband will be liable. A wife has no authority to pledge her husband's credit for mere luxuries (*y*). And "although there is a presumption that a woman living with a man, and represented by him to be his wife, has his authority to bind him by her contract for articles suitable to that station which he permits her to assume, still this presumption is open to be rebutted." *Per* ERLE, C.J. (*z*). Therefore, where a husband supplies his wife with an allowance to buy clothing for herself, or for herself and daughters, and forbids her to pledge his credit, he is not liable for clothing bought by her upon credit (*a*),

(*p*) *Stamford Banking Company v. Ball*, 10 W. R. 196.

(*q*) *Re Insole*, L. R. 1 Eq. 470.

(*r*) *Johnson v. Gallagher*, 3 D. F. J. 494; *Davies v. Jenkins*, 6 Ch. D. 728; *Matthewman's case*, L. R. 3 Eq. 781; *Butler v. Cumpston*, L. R. 7 Eq. 16; *Re London, Bombay, & Mediterranean Bank*, 18 Ch. D. 581; *Pike v. Fitzgibbon and Martin v. Fitzgibbon*, 17 Ch. D. 454; *Durrant v. Ricketts*, 8 Q. B. D. 177.

(*s*) *McHenry v. Davies*, L. R. 10 Eq. 88; *Collett v. Dickenson*, 11 Ch. D. 687.

(*t*) *Picard v. Hine*, L. R. 5 Ch. 274.

(*u*) *Hodgson v. Williamson*, 15 Ch. D. 87.

(*x*) *Re Poole, Thompson v. Bennett*, 6 Ch. D. 739.

(*y*) *Phillipson v. Hayter*, L. R. 6 C. P. 38.

(*z*) *Jolly v. Rees*, 15 C. B. N. S. 640.

(*a*) *Jolly v. Rees*, 15 C. B. N. S. 658.

although the tradesman may have no knowledge of the prohibition (b). "The wife cannot make a contract binding on her husband unless he gives her authority as his agent to do so." *Per* ERLE, C.J. (c). But he is bound to supply her with necessaries or provide her with the means of supplying herself, and if he fails to do so, she will have implied authority to provide them for herself, and to pledge his credit for that purpose. Therefore, a husband who has deserted his wife is liable to repay sums advanced to her and applied for her support (d), and to pay her legal expenses reasonably incurred (e). And where a wife took successful proceedings against her husband for a divorce on the ground of cruelty and adultery, her extra costs beyond party and party costs were held to be necessaries for which the husband was liable (f).

45 & 46  
Vict. c. 75,  
§ 1.

Implied  
authority  
to bind  
husband  
for neces-  
saries.

Where a wife who has only a small separate income lives apart from her husband, she has authority to pledge his credit for the clothing of his child, of which she has the custody under a judge's order (g). But if she is living apart, and has made her own terms as to income, and such income is duly paid, she has no authority to pledge her husband's credit even for necessaries (h). And where the wife of a lunatic lived with his children in his leasehold house, and received and had control of the whole of his income, except the cost of his maintenance, he was held not liable for the cost of repairs to the house ordered by her (i). In cases where a wife has authority, express or implied, to pledge her husband's credit, his estate is, of course, liable after his death (k).

<sup>3</sup> A married woman may sue in her own name, without joining her husband in respect of a tort—*e.g.*, trespass and assault—committed before the passing of this Act, and the damages recovered will be her separate property (l). And inasmuch as her right to sue as a *feme sole* only arose on 1st January, 1883, time will run against her under the Statutes of Limitation from that date only (m). She may also be sued alone (n); and it has been held that judgment may be signed against her, in all respects as if she were a *feme sole* (o). But execution can only issue against her separate estate which is free from restraint on anticipation; and it has now been laid down that judgment against her should be limited to such separate estate (p).

<sup>4</sup> Before the M. W. P. A. 1882, the separate estate of a married woman, though liable for her general engagements, was not liable in

Personal  
liability of

(b) *Debenham v. Mellon*, 6 App. Cas. 24, 5 Q. B. D. 394.

(c) *Jolly v. Rees*, 15 C. B. N. S. 639.

(d) *Jenner v. Morris*, 3 D. F. J. 45; *Deare v. Soutten*, L. R. 9 Eq. 151.

(e) *Wilson v. Ford*, L. R. 3 Ex. 63.

(f) *Ottaway v. Hamilton*, 3 C. P. D. 393.

(g) *Bazeley v. Forder*, L. R. 3 Q. B. 559.

(h) *Eastland v. Burchell*, 3 Q. B. D. 432.

(i) *Richardson v. Dubois*, L. R. 5

Q. B. 51.

(k) *Wilson v. Ford*, L. R. 3 Ex. 63.

(l) *Weldon v. Winslow*, W. N. (1884), p. 184; 28 S. J. 736.

(m) *Weldon v. Neal*, 32 W. R. 828.

(n) *Gloucestershire Banking Co. v. Phillips*, W. N. (1884), p. 76; *Re Martin*, W. N. (1884), p. 164.

(o) *Perks v. Mylrea*, 28 S. J. 341; W. N. (1884) 64.

(p) *Bursill v. Tanner*, 32 W. R. 827. See also *Savile v. Kane*, 28 S. J. 548.

45 & 46  
Vict. c. 75,  
§ 1. respect of her general torts, *e.g.*, breaches of trust, as they were in law the torts of her husband, and she could not make herself *personally* liable either in contract or in tort (*m*).

married  
woman.  
Parties to  
actions  
against  
married  
women.

<sup>6</sup> Formerly it was necessary to make the husband of a married woman a party to all actions, except proceedings, to render her separate estate liable, and even in such an action it was held in the C. P. Division that he ought to be a defendant (*n*). But in other cases (*o*) her separate estate was declared liable, although neither her husband nor her trustees were made defendants.

<sup>6</sup> Subsect. 3 is founded on the equitable rule laid down by TURNER and KNIGHT-BRUCE, L.JJ., as follows: "The Court is bound to impute to her the intention to deal with her separate estate, unless the contrary is clearly proved (*p*).

<sup>7</sup> Subsect. 4 reverses the previous equitable rule, which was that a married woman's contract bound only the alienable separate property which she possessed at the date of the contract, and which remained her separate property at the date of judgment (*q*); and as there was no charge until judgment, she might alienate such property before judgment (*r*), and would not be restrained by injunction from doing so *pendente lite* (*s*). *Quære*, whether this sub-section is retrospective, so as to render after-acquired separate property liable in respect of contracts entered into before the passing of the Act (*t*).

As to the liability of a married woman's separate estate in respect of her ante-nuptial debts, see note to s. 13, p. 349, *post*.

<sup>8</sup> Before the M. W. P. A. 1882, it was held that a married woman who had been sued at law for an ante-nuptial debt under s. 12 of the M. W. P. A. 1870, could not be made a bankrupt; though doubts were expressed whether an adjudication could not have been made if she had possessed separate property (*u*). These doubts were set at rest by a subsequent case, in which it was expressly held that a married woman possessed of separate estate could not be made a bankrupt (*v*). It may, therefore, be considered as settled that an adjudication can now only be made against a married woman if she has carried on a business as her separate property.

(*m*) *Johnson v. Gallagher*, 3 D. F. J. 519; *Atwood v. Chichester*, 3 Q. B. D. 722; *Durrant v. Ricketts*, 8 Q. B. D. 177.

(*n*) *Hancocks v. Demeric-Lablache*, 3 C. P. D. 197.

(*o*) *Williams v. Mercier*, 9 Q. B. D. 337; *Davies v. Jenkins*, 6 Ch. D. 728.

(*p*) *Johnson v. Gallagher*, 3 D. F. J. 494, 520. Compare *Martin v. Fitzgibbon*, 17 Ch. D. 454.

(*q*) *Martin v. Fitzgibbon*, 17 Ch. D. 454.

(*r*) *Johnson v. Gallagher*, 3 D. F. J. 494.

(*s*) *Robinson v. Pickering*, 16 Ch. D. 660 (reversing *Malins*, V.-C., *ibid.* 371).

(*t*) *Conolan v. Leyland*, 28 S. J. 619.

(*u*) *Ex parte Holland*, L. R. 9 Ch. 307—311.

(*v*) *Ex parte Jones*, 12 Ch. D. 484.

## SEPARATE ESTATE—MARRIAGE AFTER 1882.

**2.** Every woman who marries after the commencement of this Act shall be entitled to have and to hold as her separate property and to dispose of in manner aforesaid<sup>1</sup> all real and personal property which shall belong to her at the time of marriage, or shall be acquired by or devolve upon her after marriage, including any wages, earnings, money, and property gained or acquired by her in any employment, trade, or occupation, in which she is engaged, or which she carries on separately from her husband, or by the exercise of any literary, artistic, or scientific skill.<sup>2</sup>

45 & 46  
Vict. c. 75,  
**§ 2.**  
Property  
of a  
woman  
married  
after the  
Act to be  
held by  
her as a  
*feme sole*.

<sup>1</sup> "In manner aforesaid" refers to the words "by will or otherwise," . . . . "in the same manner as if she were a *feme sole*, without the intervention of any trustee," in s. 1 (1). See note thereto, p. 354, *ante*.

<sup>2</sup> The following cases, as to what constitutes a separate business by a married woman, though decided before this Act came into operation, may be usefully referred to.

Where a husband permitted his wife to continue to carry on in her own name, and with a separate banking account, a business which she had commenced before marriage, and she had the sole management of it, but received occasional assistance from her husband, it was held that the stock-in-trade and capital of the business belonged to the wife for her separate use, and that the legal personal representative of her husband had no right thereto (x).

And goods belonging to a business *bond fide* carried on by a married woman separately from her husband cannot be taken in execution for the husband's debt, although the business may originally have been his (y).

But when such a claim is made by a woman after her husband's death, the Court will require very clear and full evidence to establish it. The uncorroborated statement of the claimant is not sufficient (z).

What con-  
stitutes  
separate  
business of  
married  
woman.

## LOANS BY WIFE TO HUSBAND.

**3.** Any money or other estate of the wife lent or intrusted by her to her husband for the purpose of any trade or business carried on by him, or otherwise, shall be treated as assets of her husband's estate in case of his bankruptcy, under reservation of the wife's claim to a dividend as a creditor for

45 & 46  
Vict. c. 75,  
**§ 3.**  
Loans by  
wife to  
husband.

(x) *Ashworth v. Outram*, 5 Ch. D. 923.

(z) *Re Whittaker, Whittaker v. Whittaker*, 21 Ch. D. 657.

(y) *Lovell v. Newton*, 4 C. P. D. 7.



45 & 46  
Vict. c. 75,  
§ 3.

the amount or value of such money or other estate after, but not before, all claims of the other creditors of the husband for valuable consideration in money or money's worth have been satisfied.<sup>1</sup>

Mortgage  
to secure  
loan by  
wife to  
husband.

<sup>1</sup> The effect of this section is to place a married woman who lends money to her husband in a position similar to that of a person who lends money to a trader under an agreement in writing pursuant to the Partnership Law Amendment Act, 1865 (a).

Notwithstanding s. 5 of that Act, a mortgage by the borrower to the lender was supported as against the borrower's trustee in liquidation (b); and although that section is worded differently from s. 3 of the M. W. P. A., the principle upon which the mortgage was supported appears equally applicable to the case of a mortgage by a husband to his wife, having regard to the powers of contracting and taking legal proceedings now possessed by a married woman.

#### GENERAL POWER—LIABILITY TO DEBTS.

45 & 46  
Vict. c. 75,  
§ 4.

Execution  
of general  
power.

Effect of  
exercise of  
general  
power of  
appoint-  
ment by  
married  
woman.

4. The execution of a general power by will by a married woman shall have the effect of making the property appointed liable for her debts and other liabilities in the same manner as her separate estate is made liable under this Act.<sup>1</sup>

<sup>1</sup> Before this enactment it was established in equity (notwithstanding a decision to the contrary (c), which must be considered as overruled) that property over which a married woman had a general power of appointment by deed or will, coupled with a life estate for her separate use, with or without power of anticipation, was liable for her debts and general engagements, even though she had exercised the power by will. Such a power in effect gives her the absolute dominion over the property, and enables her to appoint to her own separate use (d). The same rule has been applied to a case where the power to appoint was by will only (e).

#### SEPARATE PROPERTY—MARRIAGE BEFORE 1883.

45 & 46  
Vict. c. 75,  
§ 5.

Property

5. Every woman married before the commencement of this Act<sup>1</sup> shall be entitled to have and to hold<sup>2</sup> and to dispose of in manner aforesaid<sup>3</sup> as her separate property all real and

(a) 28 & 29 Vict. c. 86.

(b) *Ex parte Sheil*, 4 Ch. D. 789.

(c) *Blackford v. Woolley*, 11 W. R. 478.

(d) *London Chartered Bank of Australia v. Lempriere*, L. R. 4 P. C. 572, overruling *Shattock v. Shattock*, L. R.

2 Eq. 182; *Mayd v. Field*, 3 Ch. D. 587.

(e) *Re Harvey*, *Godfrey v. Harben*, 13 Ch. D. 216; *Hodges v. Hodges*, 20 Ch. D. 749. Compare *Paul v. Paul*, 20 Ch. D. 742, and *Willoughby Osborne v. Holyoake*, 22 Ch. D. 238.

personal property, her title to which, whether vested or contingent, and whether in possession, reversion, or remainder, shall accrue after the commencement of this Act,<sup>1</sup> including any wages, earnings, money, and property so gained or acquired<sup>2</sup> by her as aforesaid.

45 & 46  
Vict. c. 75,  
§ 5.

acquired  
after the  
Act by a  
woman  
married  
before the  
Act to be  
held by  
her as a  
*feme sole*.

<sup>1</sup> Where, by a will made in 1880, a testatrix, who died in 1883, gave all her property "unto my residual legatee" X. and A. B. and B. B. "his wife to and for their own use and benefit absolutely," it was held, reversing the decision of CHITTY, J., that the three persons did not take as joint tenants in equal thirds, but that X. took one moiety and the husband and wife took the other moiety in equal shares, the wife taking her one-fourth share for her separate use (*f*). "In applying the M. W. P. A. to wills made before the Act was passed, care must be taken not to make it operate retrospectively further than is unavoidable." *Per* LINDLEY, L.J. (*g*).

In *Baynton v. Collins* (*h*), CHITTY, J., observed that there were five kinds of title mentioned, and if any of them accrued after the date of the Act it came within this section. The fair meaning to be attributed to the words "the title to which shall accrue due after the commencement of the Act" when referring to a title in reversion or remainder, was "accrue due in possession." . . . A further effect of this section, and probably one of its objects, was to enable married women to deal with their reversionary interests without the aid of Malins' Act. He, therefore, held, that a woman married before 1883 was entitled to payment on her separate receipt, of a share in a fund to which she was prior to 1883 entitled in remainder, and which fell into possession on the death of the tenant for life after Jan. 1, 1883 (*i*).

Reversion-  
ary in-  
terests of  
married  
women.

A husband need not take out administration to his wife in order to complete his title to her reversionary interest in leaseholds (*k*). As to the effect of s. 19 on s. 5, see *Re Stonor* (*l*).

<sup>2</sup> Women married after the 9th of August, 1870, are also entitled for their separate use to certain property, as defined in ss. 7 and 8 of the M. W. P. A. 1870 (*m*), which is repealed by s. 22 of the M. W. P. A. 1882, subject to the proviso that such repeal shall not affect any right acquired while the repealed Act was in force. Sects. 7 and 8 of the Act of 1870 are, therefore, still of considerable practical importance. They are as follows:—

#### SEPARATE USE UNDER M. W. P. A. 1870.

[7. Where any woman married after the passing of this Act shall during her marriage become entitled to any

33 & 34  
Vict. c. 93,  
§ 7.

(*f*) *Re March, Mander v. Harris*,  
24 Ch. D. 222.

N. (1884), p. 28.

(*g*) *Ibid.*

(*k*) *Re Bellamy, Elder v. Pearson*,  
25 Ch. D. 620.

(*h*) 28 S. J. 674.

(*l*) 24 Ch. D. 195.

(*i*) *Ibid.* Compare *Re Emery, W.*

(*m*) 33 & 34 Vict. c. 93.

Personalty



45 & 46  
Vict. c. 75,  
§ 5.

33 & 34  
Vict. c. 93,  
§ 7.

not ex-  
ceeding  
£200

under  
M. W. P.  
A. 1870.

33 & 34  
Vict. c. 93,  
§ 8.

Rents, &c.  
of real  
estate  
under  
M. W. P.  
A. 1870.

*personal property as next of kin or one of the next of kin of an intestate, or to any sum of money not exceeding two hundred pounds under any deed or will, such property shall, subject and without prejudice to the trust of any settlement affecting the same, belong to the woman for her separate use, and her receipts alone shall be a good discharge for the same.]*

[8. *Where any freehold, copyhold, or customaryhold property shall descend upon any woman married after the passing of this Act, as heiress or co-heiress of an intestate, the rents and profits of such property shall, subject and without prejudice to the trusts of any settlement affecting the same, belong to such woman for her separate use, and her receipts alone shall be a good discharge for the same.]*

All property coming to a married woman as next of kin of an intestate was held to belong to her for her separate use under s. 7 of the M. W. P. A. 1870, the limit of £200 therein mentioned being applicable only to property coming to her under deed or will (i).

A pension payable to the widow of a civil servant out of the East India Company's Trust Fund also belongs to her for her separate use during any subsequent coverture (j). And, of course, furniture purchased by a married woman out of the savings of her separate income is her separate property (k).

Section 26 of the Agricultural Holdings (England) Act, 1883 (l) provides as follows:—

46 & 47  
Vict. c. 61,  
§ 26.

Status of  
married  
women  
under  
Agricul-  
tural  
Holdings  
Act.

[A woman married before the commencement of the Married Women's Property Act, 1882, entitled for her separate use to land, her title to which accrued before such commencement as aforesaid, and not restrained from anticipation, shall, for the purposes of this Act, be in respect of land as if she was unmarried.

Where any other woman married before the commencement of the Married Women's Property Act, 1882, is desirous of doing any act under this Act in respect of land, her title to which accrued before such commencement as aforesaid, her husband's concurrence shall be requisite, and she shall be examined apart from him by the county court, or by

(i) *Re Voss, Voss v. Voss*, 13 Ch. D. 504.

(j) *Re Peacock*, 10 Ch. D. 490.

(k) *Duncan v. Cashin*, L. R. 10 Q. B. 554.

(l) 46 & 47 Vict. c. 61.

the judge of the county court for the place where she for the time being is, touching her knowledge of the nature and effect of the intended act, and it shall be ascertained that she is acting freely and voluntarily.] 45 & 46  
Vict. c. 75,  
**§ 5.**

<sup>3</sup> "In manner aforesaid" refers to the words "as if she were a *feme sole*" in s. 1 (1). Unless a restraint, on anticipation or alienation, was expressly imposed (as to which see s. 19 and notes thereto, p. 399, *post*), the power of disposition was always, in equity, incident to the separate estate of a married woman, as well in real as personal estate, either by act *inter vivos* or by will (*m*); and if she makes no will her husband takes, not by marital right, but, on taking out administration, as next of kin (*n*). But as, during coverture, she can make a valid will of her separate estate only, any will executed by her during coverture cannot pass property acquired by her after her husband's death (*o*). Nor will a renunciation by her husband of his rights enable her to make a valid will of her real estate (*p*). Although, if restrained from anticipation, she cannot dispose of the income of her real estate during coverture, she may bar and dispose of her estate tail, subject to her life interest therein (*q*). As to powers of a married woman under the S. L. A. 1882, see s. 61 of that Act, p. 529, *post*.

Every disposition by a married woman of her separate estate may be made without the formalities prescribed by ss. 77 *et seq.* of the Fines and Recoveries Act (*r*). But such a disposition of land by a woman married before 1883, can only affect the wife's equitable estate; and in order to pass the bare legal estate the concurrence of her trustees (if any) is necessary; and if there are no trustees it is conceived that the bare legal estate can only be passed by an acknowledged deed in which the husband concurs, unless his concurrence is dispensed with under s. 91 of the F. and R. A., as to which see p. 380, *post*.

A woman married before the 1st of January, 1883, is, with regard to property not belonging to her for her separate use, still under the same disabilities as before the passing of the M. W. P. A. 1882. Subject to the exceptions above mentioned, and to certain provisions enabling land of a married woman to be conveyed for public purposes (*s*), she can dispose of only her real estate, or of any interest therein, only by deed acknowledged under the F. and R. Act as amended by the C. A. 1882. "The fee simple of a wife may be affected by a trust for her separate use in one of three ways: (1) by conveyance to a trustee or a declaration of trust by the wife before marriage, if made with the husband's con-

Marriage  
before  
1883.  
Power of  
disposi-  
tion.

Power of  
disposition  
where no  
separate  
estate.

Real  
estate.

(*m*) *Taylor v. Meads*, 4 D. J. S. 597; *Farington v. Parker*, L. R. 4 Eq. 116; *Lechmere v. Brotheridge*, 32 B. 353, 369; *Tullett v. Armstrong*, 1 B. 1, 4 M & Cr. 377.

(*n*) *Fettiplace v. Gorges*, 1 Ves. Jr. 46.

(*o*) *Willock v. Noble*, L. R. 7 H. L. 580.

(*p*) *Dye v. Dye*, 13 Q. B. D. 147.

(*q*) *Cooper v. Macdonald*, 7 Ch. D. 288.

(*r*) *Pride v. Bubbs*, L. R. 7 Ch. 64.

(*s*) 8 Vict. c. 18, s. 7; 13 & 14 Vict. c. 31, s. 6; 4 & 5 Vict. c. 38, s. 5; 23 & 24 Vict. c. 112, s. 47; 36 & 37 Vict. c. 50, s. 3.

45 & 46 Vict. c. 75, § 5. sent; (2) by an agreement between the intended husband and wife before marriage; and (3) by an acknowledged assurance by a wife after marriage." *Per* BRETT, M.R., BOWEN and FRY, L.JJ. (s). She may dispose of her absolute vested interest in personal estate not settled to her separate use with the concurrence of her husband without acknowledgment or other formality, such personalty being in law the property of her husband. By virtue of Sir R. Malins' Act (t) she may, with the concurrence of her husband, dispose by deed acknowledged under the F. and R. Act of any reversionary interest in personalty her interest in which has accrued under an instrument dated after the 31st of December, 1857. But, neither she nor her husband can make any disposition which will bind her if she survives him of any reversionary interest in personalty, her title to which has accrued under an instrument of an earlier date than the 1st of January, 1858, or of any chose in action belonging to her and not reduced into possession by her husband during coverture.

Person-  
alty.

Rever-  
sionary  
personalty.

Choses in  
action.

*Choses in action* to which women married either before or after the 1st of January, 1883, become entitled after that date will of course belong to them for their separate use, but a *chose in action* to which any woman then married became entitled before that date will belong to her husband if he reduces it into possession during the coverture. If not, it will, upon the death of either, belong to the survivor: if the wife, in her own right; if the husband, upon taking out administration to his wife.

In the event of a judicial separation, or a protection order, the wife's choses in action not reduced into possession belong to her as if she were a *feme sole* (u). As to what amounts to reduction into possession in various cases (v), see the cases cited below.

Sections 77 to 84 and 89 to 92, inclusive, of the F. and R. Act are the unrepealed portions of that Act which relate to dispositions of property by married women.

Section 77 is as follows:—

#### CONVEYANCE UNDER F. AND R. A.

3 & 4 Will. IV.  
c. 74,  
§ 77.

[77. And be it further enacted, that after the thirty-first day of December, one thousand eight hundred and thirty-three, it shall be lawful for every married woman, in every case

Convey-

(s) *Dye v. Dye*, 13 Q. B. D. 147, 156.

(t) 20 & 21 Vict. c. 57.

(u) *Johnson v. Lander*, L. R. 7 Eq. 228; *Nicholson v. Drury Buildings Estate Co.*, 7 Ch. D. 48.

(v) *Fleet v. Perrins*, L. R. 3 Q. B. 536, L. R. 4 Q. B. 500; *Scrutton v. Pattillo*, L. R. 19 Eq. 369; *Aitchison v. Dixon*, L. R. 10 Eq. 589; *Parker*

*v. Lechmere*, 12 Ch. D. 256; *Nicholson v. Drury Buildings Estate Co.*, 7 Ch. D. 48; *Re Coward and Adam's Purchase*, L. R. 20 Eq. 179; *Re M. A. Harding*, L. R. 2 P. & M. 394; *Re Barber, Dardier v. Chapman*, 11 Ch. D. 442; *Ewart v. Chubb*, L. R. 20 Eq. 454; *Penfold v. Mould*, L. R. 4 Eq. 562.

except that of being tenant in tail, for which provision is already made by this Act, by deed to dispose of lands of any tenure and money subject to be invested in the purchase of lands, and also to dispose of, release, surrender, or extinguish any estate which she alone, or she and her husband in her right, may have in any lands of any tenure, or in any such money as aforesaid,<sup>4</sup> and also to release or extinguish any power which may be vested in or limited or reserved to her in regard to any lands of any tenure, or any such money as aforesaid, or in regard to any estate in any lands of any tenure, or in any such money as aforesaid, as fully and effectually as she could do if she were a *feme sole*; save and except that no such disposition, release, surrender, or extinguishment shall be valid and effectual unless the husband concur in the deed by which the same shall be effected, nor unless the deed be acknowledged by her as hereinafter directed: Provided always, that this Act shall not extend to lands held by copy of court roll of or to which a married woman, or she and her husband in her right, may be seised or entitled for an estate at law, in any case in which any of the objects to be effected by this clause could before the passing of this Act have been effected by her, in concurrence with her husband, by surrender into the hands of the lord of the manor of which the lands may be parcel.]

45 & 46  
Vict. c. 75,  
§ 5.

3 & 4  
Will. IV.  
c. 74,  
§ 77.

ance by  
married  
woman,  
with her  
husband's  
concur-  
rence,  
under  
Fines and  
Recoveries  
Act.

Not to  
extend to  
copyholds  
in certain  
cases.

Sections 6 and 7 of the Act to amend the Law of Real Property (x) contain the following provisions as to alienation by married women:—

- [6. That, after the first day of October, one thousand eight hundred and forty-five, a contingent, an executory, and a future interest, and a possibility coupled with an interest, in any tenements or hereditaments of any tenure, whether the object of the gift or limitation of such interest or possibility be or be not ascertained, also a right of entry whether immediate or future, and whether vested or contingent, into or upon any tenements or hereditaments in England of any tenure, may be disposed of by deed; but

8 & 9  
Vict. c.  
106,  
§ 6.

Convey-  
ance by  
married  
woman  
under Act  
to amend  
the Law of  
Real Pro-  
perty.

(x) 8 & 9 Vict. c. 106.

45 & 46  
Vict. c. 75,  
§ 5.

8 & 9  
Vict. c.  
106,  
§ 6.

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that no such disposition shall, by force only of this Act, defeat or enlarge an estate tail; and that every such disposition by a married woman shall be made conformably to the provisions relative to dispositions by married women of an Act passed in the third and fourth years of the reign of His late Majesty King William the Fourth, intituled "An Act for the Abolition of Fines and Recoveries, and for the Substitution of more simple Modes of Assurance," or in Ireland of an Act passed in the fourth and fifth years of the reign of His said late Majesty, intituled "An Act for the Abolition of Fines and Recoveries, and for the Substitution of more simple Modes of Assurance in Ireland."]

8 & 9 Vict.  
c. 106,  
§ 7.

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Disclaim-  
ers under  
F. and  
R. A.

[7. That, after the first day of October, one thousand eight hundred and forty-five, an estate or interest in any tenements or hereditaments in England of any tenure may be disclaimed by a married woman by deed; and that every such disclaimer shall be made conformably to the said provisions of the said Act for the Abolition of Fines and Recoveries, and for the substitution of more simple Modes of Assurance.]

The alienation by married women of reversionary interests in personal estate is governed by Sir R. Malins' Act (*y*), ss. 1 and 2 of which are as follows :—

20 & 21  
Vict. c. 57,  
§ 1.

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Power for  
married  
women to  
dispose of  
rever  
sionary  
interests in  
personal  
estate  
under  
Malins'  
Act.

[1. After the thirty-first day of December, one thousand eight hundred and fifty-seven, it shall be lawful for every married woman by deed to dispose of every future or reversionary interest, whether vested or contingent, of such married woman, or her husband in her right, in any personal estate whatsoever to which she shall be entitled under any instrument made after the said thirty-first day of December, one thousand eight hundred and fifty-seven (except such a settlement as after mentioned), and also to release or extinguish any power which may be vested in or limited or reserved to her in regard to any such personal estate, as fully and effectually as she could do if she were a *feme sole*, and also to release and extinguish her right

(*y*) 20 & 21 Vict. c. 57.

or equity to a settlement out of any personal estate to which she, or her husband in her right, may be entitled in possession under any such instrument as aforesaid, save and except that no such disposition, release, or extinguishment shall be valid unless the husband concur in the deed by which the same shall be effected, nor unless the deed be acknowledged by her as hereinafter directed: Provided always, that nothing herein contained shall extend to any reversionary interest to which she shall become entitled by virtue of any deed, will, or instrument by which she shall be restrained from alienating or affecting the same.]

45 & 46  
Vict. c. 75,  
**§ 5.**

20 & 21  
Vict. c. 57,  
**§ 1.**

- [2. Every deed to be executed in England or Wales by a married woman for any of the purposes of this Act shall be acknowledged by her, and be otherwise perfected, in the manner in and by the Act passed in the third and fourth years of the reign of His late Majesty King William the Fourth, intituled "An Act for the Abolition of Fines and Recoveries, and for the Substitution of more simple Modes of Assurance," prescribed for the acknowledgment and perfecting of deeds disposing of interests of married women in land; and every deed to be executed in Ireland by a married woman for any of the purposes of this Act shall be acknowledged by her and be otherwise perfected in the manner in and by the Act passed in the fourth and fifth years of the reign of his late Majesty King William the Fourth, intituled "An Act for the Abolition of Fines and Recoveries, and the Substitution of more simple Modes of Assurance, in Ireland," prescribed for the acknowledgment and perfecting of deeds disposing of interests of married women in land; and all and singular the clauses and provisions in the said Acts concerning the disposition of lands by married women, including the provisions for dispensing with the concurrence of the husbands of married women, in the cases in the said Acts mentioned, shall extend and be applicable to such interests in personal estate and to such powers as may be disposed of, released or extinguished by virtue of this Act, as fully and effectually as if such interests or powers were interests in or powers over land.]

20 & 21  
Vict. c. 57,  
**§ 2.**

Deeds  
under  
Malins'  
Act to be  
acknow-  
ledged by  
married  
women in  
the manner  
required  
by F. and  
R. Act.

45 & 46  
Vict. c. 75,  
**§ 5.**

“These words therefore enable a married woman by her deed, acknowledged according to the provisions of this Act, to dispose of any interest in land, either in law or in equity, or any charge, lien, or incumbrance in or upon or affecting land either at law or in equity.” *Per* LORD HATHERLEY (then V.-C. WOOD) (*z*). Accordingly, it has been held that she and her husband may so dispose of her contingent remainder in fee (*a*), of her vested reversionary life estate in freeholds (*b*), of her share (whether in possession or reversion) of the proceeds of sale of real estate devised in trust for sale and distribution either before or after the land is actually sold (*c*); and the fact that her husband has previously become bankrupt does not prevent him from concurring in such deed (*d*).

Powers of  
disposition  
under  
Fines and  
Recoveries  
Act and  
Malins'  
Act.

Where a fund in court was liable to be laid out in the purchase of land to be settled in trust for A. for life, and after his death, by mortgage, sale, or demise, to raise and pay £250 to a married woman, it was doubted whether she could bind her reversionary interest in the £250 by deed acknowledged, either under the F. and R. A. or under s. 6 of the Act to Amend the Law of Real Property (*e*); but it is now settled that a married woman may, by deed acknowledged, dispose of her interest in a debt secured or charged upon land; and after such a deed, though executed as surety for her husband, she cannot enforce her equity to a settlement (*f*). But if the charge has been actually paid off, and is money in the hands of trustees, it is converted into personalty, and a married woman cannot dispose of her vested life interest therein under the F. and R. A., so as to bind her in the event of surviving her husband (*g*). Where an Act of Parliament authorised the sale of land belonging to married women, and authorised the Court to distribute the proceeds, it was held to amount to a conversion of the land into money, and to render acknowledgment unnecessary (*h*).

Money in-  
vested in  
land.

Where a personalty fund belonging partly to married women was, in breach of trust, invested in the purchase of land, it was held that a conveyance acknowledged under this Act bound the interests of the married women (*i*).

Mortgage.

Where a married woman concurs with her husband in a mortgage of her own real estate, or of her interest in his or any other real estate, foreclosure may be enforced against her (*k*); but such concurrence only affects her interest so far as is necessary to give validity to the mortgage, and does not, in the absence of an express stipulation to that effect, ex-

(*z*) *Briggs v. Chamberlain*, 11 H. 69.  
(*a*) *Crofts v. Middleton*, 8 D. M. G. 192.

(*b*) *Ex parte Gill*, 1 Bing. N. C. 168.  
(*c*) *Briggs v. Chamberlain*, 11 H. 69; *Bowyer v. Woodman*, L. R. 3 Eq. 313.

(*d*) *Re Jakeman's Trusts*, 23 Ch. D. 344. Compare *Re Batchelor*, L. R. 16 Eq. 481.

(*e*) *Hobby v. Collins*, 4 De G. & S. 289.

(*f*) *Williams v. Cooke*, 4 Giff. 343.

(*g*) *Re Alges*, I. R. 2 Eq. 485.

(*h*) *Ex parte Ellison*, 2 Y. & C. (Ex.) 528.

(*i*) *Re Durrant and Stonor*, 18 Ch. D. 106; but compare *Re Newton's Trusts*, 23 Ch. D. 181.

(*k*) *Williams v. Cooke*, 4 Giff. 343.



tinguish her equity of redemption (*l*). But the destination of the equity of redemption may be changed by express words which in effect amount to a new settlement (*m*).

45 & 46  
Vict. c. 75,  
§ 5.  
3 & 4  
Will. IV.  
c. 74,  
§ 77.

It has been held that a compromise entered into by a husband with regard to his wife's real estate cannot be enforced against her, unless her assent is testified by an instrument in the form required by the F. and R. A., even though the wife may have taken advantage of and acted upon the terms of the compromise (*n*). Nor will any contract by a wife relating to her real estate not belonging to her for her separate use, either with her husband or a stranger, be enforced against her heir unless evidenced or followed by a deed duly acknowledged (*o*). And it was held in an Irish case that an agreement by a wife with her husband to release part of a jointure rent-charge affecting lands belonging to him could not be enforced against her, there having been no deed acknowledged under the F. and R. A. (Ireland) (*p*), s. 68 of which is similar to s. 77 of this Act (*q*).

Where a married woman, entitled to a share in the proceeds of lands devised in trust for sale and distribution, joined in a conveyance of the land to a purchaser, but such conveyance was not acknowledged, it was held inoperative against her (*r*).

Where a married woman is lunatic or of unsound mind, the lords justices can order a sale of her real estate with the concurrence of her husband which will bind her beneficial interest but, *semble*, will not pass the legal estate (*s*); but the heir, being bound, will hold the legal estate as a bare trustee for the purchaser.

Where a lessee was allowed to remain in possession during the whole term expressed to be granted by an unacknowledged lease of a married woman's land, he was held to be bound by his covenants contained in the lease (*t*).

As to the powers of a married woman who is tenant for life under the S. L. A., 1882, see s. 61 of that Act, p. 529, *post*.

#### SAVING AS TO POWERS.

[78. Provided always, and be it further enacted, that the powers of disposition given to a married woman by this Act shall not interfere with any power which, independently

3 & 4  
Will. IV.  
c. 74,  
§ 78.

(*l*) *Wood v. Wood*, 7 B. 183; *Re Betton*, L. R. 12 Eq. 553.

(*m*) *Eddleston v. Collins*, 3 D. M. G. 1.

(*n*) *Nicholl v. Jones*, L. R. 3 Eq. 696.

(*o*) *Lassence v. Tierney*, 1 M. & G. 551, 573.

(*p*) 4 & 5 Will. IV. c. 92.

(*q*) *Cahill v. Cahill*, 8 App. Ca. 420.

(*r*) *Franks v. Bollans*, L. R. 3 Ch. 717.

(*s*) *Re Stables*, 12 W. R. 513.

(*t*) *Toler v. Sluter*, L. R. 3 Q. B. 42.

The  
powers of



45 & 46  
Vict. c. 75,  
**§ 5.**  
3 & 4  
Will. IV.  
c. 74,  
**§ 78.**

disposition  
given to a  
married  
woman by  
F. and R.  
A. not to  
interfere  
with any  
other  
powers.

of this Act, may be vested in or limited or reserved to her, so as to prevent her from exercising such power in any case, except so far as by any disposition made by her under this Act she may be prevented from so doing in consequence of such power having been suspended or extinguished by such disposition.]

Sects. 3 and 4 of Sir R. Malins' Act in effect provide that married women may exercise any powers vested in them independently of the Act, and that the power conferred by s. 1 of that Act shall not extend to personalty settled on a woman on her marriage.

A married woman may exercise a power conferred upon her notwithstanding coverture, at any time (*u*), and she may exercise, without acknowledgment, a general power of appointment conferred on her by a settlement of her property made when she was a *feme sole* (*x*).

#### ACKNOWLEDGMENT UNDER F. AND R. A.

Sect. 79 of the Fines and Recoveries Act is as follows:—

3 & 4  
Will. IV.  
c. 74,  
**§ 79.**

Every  
deed by a  
married  
woman,  
not exe-  
cuted by  
her as  
protector,  
to be  
acknow-  
ledged by  
her before  
a judge,  
&c.

[79. And be it further enacted, that every deed to be executed by a married woman for any of the purposes of this Act, except such as may be executed by her in the character of protector, for the sole purpose of giving her consent to the disposition of a tenant in tail, shall, upon her executing the same, or afterwards, be produced and acknowledged by her as her act and deed before a judge of one of the Superior Courts at Westminster, or a master in Chancery, or before *two of the perpetual commissioners, or two special commissioners*, to be respectively appointed as hereinafter provided.]

Masters in Chancery no longer exist.

A master of the Queen's Bench Division may not exercise the authority of a judge under this section (*y*).

Sect. 73 of the County Court Amendment Act, 1856, provides as follows:—

19 & 20  
Vict. c.  
108,  
**§ 73.**

[73. Any acknowledgment to be made by any married woman

(*u*) *D. v. Bird*, 5 B. & A. 695.

(*x*) *Wood v. Wood*, L. R. 10 Eq.

220, doubting *Bristow v. Warde*, 2

*Ves.* 336, and *Gould v. Gould*, 2 Jur. N. S. 404.

(*y*) R. S. C. 1883, Ord. LIV. r. 12.

of any deed under the Act of the third and fourth years of the reign of His late Majesty King William the Fourth, chapter seventy-four, may be received by a judge of a County Court in the same manner as such acknowledgment may be received by a judge of a Superior Court.]

45 & 46  
Vict. c. 75,  
§ 5.  
19 & 20  
Vict. c.  
108,  
§ 73.

Until the 1st of January, 1883, it was necessary for two perpetual or special commissioners to act, but acknowledgments may now be taken by a single commissioner by virtue of s. 7 of the C. A. 1882 (2), which is as follows:—

[7.—(1.) In section seventy-nine of the Fines and Recoveries Act, and section seventy of the Fines and Recoveries (Ireland) Act, there shall, by virtue of this Act, be substituted for the words “two of the perpetual commissioners, or two special commissioners,” the words “one of the perpetual commissioners, or one special commissioner;” and in section eighty-three of the Fines and Recoveries Act, and section seventy-four of the Fines and Recoveries (Ireland) Act, there shall, by virtue of this Act, be substituted for the word “persons” the word “person,” and for the word “commissioners” the words “a commissioner;” and all other provisions of those Acts, and all other enactments having reference in any manner to the sections aforesaid, shall be read and have effect accordingly.<sup>1</sup>

45 & 46  
Vict. c. 39,  
§ 7.

Acknowledgment  
of deeds  
by married  
women.

One commissioner  
may take  
acknowledgment  
under  
F. & R. A.  
and C. A.,  
1884.

(2.) Where the memorandum of acknowledgment by a married woman of a deed purports to be signed by a person authorised to take the acknowledgment, the deed shall, as regards the execution thereof by the married woman, take effect at the time of acknowledgment, and shall be conclusively taken to have been duly acknowledged.

(3.) A deed acknowledged before or after the commencement of this Act by a married woman, before a judge of the High Court of Justice in England or Ireland, or before a judge of a County Court in England, or before a chairman in Ireland, or before a perpetual commissioner or a special commissioner, shall not be impeached or impeachable

(2) 45 & 46 Vict. c. 39.

45 & 46  
Vict. c. 75,  
§ 5.

45 & 46  
Vict. c. 39,  
§ 7.

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39 & 40  
Vict. c. 59.

44 & 45  
Vict. c. 68.

40 & 41  
Vict. c. 57.

by reason only that such judge, chairman, or commissioner was interested or concerned either as a party, or as solicitor or clerk to the solicitor for one of the parties, or otherwise, in the transaction giving occasion for the acknowledgment; and General Rules shall be made<sup>2</sup> for preventing any person interested or concerned as aforesaid from taking an acknowledgment; but no such Rule shall make invalid any acknowledgment; and those Rules shall, as regards England, be deemed Rules of Court within section seventeen of the Appellate Jurisdiction Act, 1876, as altered by section nineteen of the Supreme Court of Judicature Act, 1881, and shall, as regards Ireland, be deemed Rules of Court within the Supreme Court of Judicature Act (Ireland), 1877, and may be made accordingly, for England and Ireland respectively, at any time after the passing of this Act, to take effect on or after the commencement of this Act.

(4.) The enactments described in the schedule to this Act are hereby repealed.<sup>3</sup>

(5.) The foregoing provisions of this section, including the repeal therein, apply only to the execution of deeds by married women after the commencement of this Act.

(6.) Notwithstanding the repeal or any other thing in this section, the certificate, if not lodged before the commencement of this Act, of the taking of an acknowledgment by a married woman of a deed executed before the commencement of this Act, with any affidavit relating thereto, shall be lodged, examined, and filed in the like manner and with the like effects and consequences as if this section had not been enacted.

(7.) There shall continue to be kept in the proper office of the Supreme Court of Judicature an index to all certificates of acknowledgment of deeds by married women lodged therein, before or after the commencement of this Act, containing the names of the married women and their husbands, alphabetically arranged, and the dates of the certificates and of the deeds to which they respectively relate, and other particulars found convenient; and every

such certificate lodged after the commencement of this Act shall be entered in the index as soon as may be after the certificate is filed.

45 & 46  
Vict. c. 75,  
§ 5.  
45 & 46  
Vict. c. 39,  
§ 7.

(8.) An office copy of any such certificate filed before or after the commencement of this Act shall be delivered to any person applying for the same; and every such office copy shall be received as evidence of the acknowledgment of the deed to which the certificate refers.<sup>4]</sup>

<sup>1</sup> When two commissioners were necessary, it was held that one of them might be the solicitor for the parties to the transaction or some of them (a), but it was afterwards doubted whether it was not necessary for both to be absolutely disinterested (b). In consequence of this doubt, the Act 17 & 18 Vict. c. 75 was passed on the 7th of August, 1854. This Act, which in effect provided that an acknowledgment should not be impeachable by reason only of the commissioners, or either of them, being interested or professionally concerned in the transaction, and that the Court of Common Pleas might make rules for preventing interested commissioners from acting, is repealed by the above section.

Commis-  
sioners  
should not  
be in-  
terested.

<sup>2</sup> The rules which have been made under sub-s. 3 of that section form part of the Rules of the Supreme Court, issued in December, 1882, Rules 1 and 4 are as follows:—

- [1. No person authorised or appointed under the Act 3 & 4 Will. IV. c. 74 (in these Rules referred to as the Fines and Recoveries Act) to take the acknowledgments of deeds by married women, shall take any such acknowledgment if he is interested or concerned either as a party or as a solicitor or clerk to the solicitor for one of the parties or otherwise in the transaction giving occasion for the acknowledgment.]
- [4. When an acknowledgment is taken by any person other than a judge, the following declaration shall be added to the memorandum of acknowledgment:—

Rules as to  
interested  
commis-  
sioners.  
Rules 1 &  
4 under  
C. A. 1882,  
§ 7. (Dec.  
1882.)

“And I declare that I am not interested or concerned either as a party or as a solicitor or clerk to the solicitor for one of the parties or otherwise in the transaction giving occasion for the said acknowledgment.”]

For other Rules under this section see pp. 374, 378 and 379.

A rule had been previously made to the effect that only one interested commissioner might act. It was held that the repealed provision was not intended to justify the commissioners in acting irregularly, but merely to guard against an innocent purchaser being prejudiced by the irregularity; and therefore, where a disinterested commissioner had taken the acknowledgment, and had died without verifying the certificate, and the other commissioner was interested, and had not taken a

(a) *Re Scholefield*, 3 Scott, 657.

(b) *Re Ollerton*, 15 C. B. 796.

45 & 46  
Vict. c. 75, sufficiently active part in the proceedings to be able to make an affidavit verifying it, the Court refused to allow the certificate to be filed (c).

**§ 5.**

<sup>3</sup> The enactments in the schedule are ss. 85 to 88, and part of s. 84, of the F. and R. A. (d); the corresponding sections of the F. and R. (Ireland) Act (e); the Act to Remove Doubts concerning the Due Acknowledgment of Deeds by Married Women (f); and the Acknowledgment of Deeds by Married Women (Ireland) Act, 1878 (g).

<sup>4</sup> Sub-ss. 6, 7 and 8 apply only to deeds acknowledged before 1st January, 1883. As to deeds acknowledged after that date, no certificate or affidavit is necessary; but the memorandum mentioned at p. 378, *post*, is sufficient. Sub-s. 6 of course applies only to the case of a deed having been acknowledged before that date, and it enables the certificate and affidavit to be filed, notwithstanding the repeal of the provisions requiring a certificate.

Sect. 80 of the F. and R. A. is as follows:—

3 & 4  
Will. IV.  
c. 74,  
**§ 80.**

The judge,  
&c., before  
receiving  
such  
acknow-  
ledgment,  
to examine  
her apart  
from her  
husband.

[80. And be it further enacted, that such judge, master in Chancery, or commissioners as aforesaid, before he or they shall receive the acknowledgment by any married woman of any deed by which any disposition, release, surrender, or extinguishment shall be made by her under this Act, shall examine her,<sup>1</sup> apart from her husband,<sup>2</sup> touching her knowledge of such deed, and shall ascertain whether she freely and voluntarily consents to such deed, and unless she freely and voluntarily consent to such deed shall not permit her to acknowledge the same; and in such case such deed shall, so far as relates to the execution thereof by such married woman, be void.]

<sup>1</sup> The mode of examination is prescribed by the following rule, issued in December, 1882 :—

Rule 2  
under  
C. A. 1882,  
§ 7.  
(Dec.,  
1882).

[2. Before a commissioner shall receive an acknowledgment, he shall inquire of the married woman, separately and apart from her husband and from the solicitor concerned in the transaction, whether she intends to give up her interest in the estate to be passed by the deed without having any provision made for her; and where the married woman answers in the affirmative, and the commissioner shall have no reason to doubt the truth of her answer, he shall proceed to receive the acknowledgment; but if it shall appear to him that it is intended that provision is to be made for the married woman, then the com-

(c) *Ex parte Menhennett*, L. R. 5 C. P. 16. But compare *Re Packer*, L. R. 5 C. P. 424.  
(d) 3 & 4 Will. IV. c. 27.

(e) 4 & 5 Will. IV. c. 92.  
(f) 17 & 18 Vict. c. 75.  
(g) 41 & 42 Vict. c. 23.

missioner shall not take her acknowledgment until he is satisfied that such provision has been actually made by some deed or writing produced to him ; or if such provision shall not have been actually made before, then the commissioner shall require the terms of the intended provision to be shortly reduced into writing, and shall verify the same by his signature in the margin, at the foot, or at the back thereof.]

45 & 46  
Vict. c. 75,  
§ 5.

This rule is based upon rule 3 of Reg. Gen. of Hilary, 1834, which it supersedes. The following decisions under the old rule will equally apply to the present one :—

The married woman must be examined, though she may be deaf and dumb (*h*). In this case the deed is explained to her, and her consent signified by signs, and the certificate should show that this has been done (*i*). Examination of married woman.

Where any provision is said to have been made for a married woman, the certificate should state that the deed making provision has been executed, and not merely that it has been engrossed (*k*).

When a married woman is examined, no one connected with her husband ought to be present (*l*).

Sect. 81 of the F. and R. A. is as follows :—

[81. And be it further enacted, that for the purpose of providing convenient means of taking acknowledgments by married women of the deeds to be executed by them as aforesaid, the *Lord Chief Justice of the Court of Common Pleas at Westminster*<sup>1</sup> shall from time to time appoint such proper persons as he shall think fit, for every county, riding, division, soke, or place for which there may be a clerk of the peace, to be perpetual commissioners for taking such acknowledgments, and such commissioners shall be removable by and at the pleasure of the said Lord Chief Justice ; and lists of the names of such commissioners for the time being, with the names of their places of residence, and the counties, ridings, divisions, sokes, or places for which they shall be respectively appointed to act, shall from time to time be made out and be kept by the officer of the *Court of Common Pleas at Westminster* with whom the certificates of the acknowledgments by married women are to be lodged as hereinafter mentioned ; and such officer shall from time to time transmit, without fee or reward, to

3 & 4  
Will. IV.  
c. 74,  
§ 81.

As to the appointment of perpetual commissioners for each county or place, and the making out and keeping of the lists of the commissioners and the delivery of copies.

(*h*) *Ex parte Williams*, 9 Dowl. P. C. 72.

(*i*) *Re Harper*, 7 Scott N. R. 431.

(*k*) *Re Dallas*, 10 C. B. N. S. 346.

(*l*) *Re Bendyshe*, 3 Jur. N. S. 727.

45 & 46  
Vict. c. 75,  
§ 5.  
3 & 4  
Will. IV.  
c. 74,  
§ 81.

the clerk of the peace for each county, riding, division, soke, or place, or his deputy, a copy of the list to be so from time to time made out for that county, riding, division, soke, or place, and such officer shall deliver a copy, signed by him, of the list for the time being for any county, riding, division, soke, or place, to any person applying for the same; and the clerk of the peace for each county, riding, division, soke, or place, or his deputy, shall deliver a copy, signed by him, of the list last transmitted to him as aforesaid to any person applying for the same.]

<sup>1</sup> All powers and authorities formerly exercised by the Lord Chief Justice of the Common Pleas are now vested in the Lord Chief Justice of England (*m*), and the powers under this section are expressly vested in him by the Judicature Act, 1881 (*n*).

Sect. 82 of the F. and R. A. is as follows:—

3 & 4  
Will. IV.  
c. 74,  
§ 82.

Power of  
perpetual  
commis-  
sioners not  
confined  
to any  
particular  
place.

[82. Provided always, and be it further enacted, that any person appointed commissioner for any particular county, riding, division, soke, or place, shall be competent to take the acknowledgment of any married woman wheresoever she may reside, and wheresoever the lands or money in respect of which the acknowledgment is to be taken may be.]

Notwithstanding this section, it was held that both commissioners who took an acknowledgment in a particular county must be commissioners appointed for that county (*o*). But this decision was not followed by JESSEL, M.R., who held that any perpetual commissioner could take an acknowledgment, not only in the county for which he was appointed, but anywhere in England (*p*).

Sect. 83 of the F. and R. A. is as follows:—

3 & 4  
Will. IV.  
c. 74,  
§ 83.

If, from  
being  
beyond  
seas, &c., a  
married  
woman be

[83. And be it further enacted, that in those cases where, by reason of residence beyond seas, or ill health, or any other sufficient cause, any married woman shall be prevented from making the acknowledgment required by this Act before a judge or a master in Chancery, or any of the perpetual commissioners to be appointed as aforesaid, it shall be lawful for the Court of Common Pleas at Westminster,

(*m*) Order in Council, 16 Dec., 1880.

(*n*) 44 & 45 Vict. c. 68, s. 26.

(*o*) *Webster v. Carline*, 4 Man. & Gr.

27.

(*p*) *Blackman v. Blackman*, 3 Ch.

D. 633.



or any judge of that Court, to issue a commission specially appointing any persons therein named to be commissioners to take the acknowledgment by any married woman to be therein named of any such deed as aforesaid: Provided always, that every such commission shall be made returnable within such time, to be therein expressed, as the said Court or judge shall think fit.]

The commission may go with a blank for the Christian name of the husband (*q*) or wife (*r*) where the exact Christian name is not known; but, in that case, the parties should be verified by affidavit.

And where a mistake is made in the Christian or surname of a commissioner, so that the name in the commission does not correspond exactly with the signature of the indorsed memorandum, an affidavit identifying the commissioner and explaining the mistake should be made (*s*).

A commission to take the acknowledgment of the wife of an officer in India was addressed to all or any two of the officers of his regiment. On the arrival of the commission he was attached to another regiment 1000 miles away from all the commissioners, and liable to be ordered elsewhere any day. An acknowledgment taken by two officers of the regiment to which he was then attached was held sufficient (*t*). In a recent case, an acknowledgment taken in New Zealand before a commissioner authorised to administer oaths in New Zealand was, under 15 & 16 Vict. c. 86, s. 52, held sufficient (*u*).

Where the documents required, under the repealed sections of the F. and R. A., to verify the taking of the acknowledgment had been lost in transit, the Court allowed a duplicate commission to go out to Australia (*x*).

Sect. 84 of the F. and R. A. is as follows:—

[84. And be it further enacted, that when a married woman shall acknowledge any such deed as aforesaid, the judge, master in Chancery, or commissioners taking such acknowledgment shall sign a memorandum, to be indorsed on or written at the foot or in the margin of such deed, which memorandum, subject to any alteration which may from time to time be directed by the Court of Common Pleas, shall be to the following effect; *videlicet*,

45 & 46  
Vict. c. 75,  
§ 5.  
3 & 4  
Will. IV.  
c. 74,  
§ 83.

prevented  
from  
making the  
acknow-  
ledgment,  
special  
commis-  
sioners  
to be  
appointed.

3 & 4  
Will. IV.  
c. 74,  
§ 84.

When a  
married  
woman  
shall ac-  
knowledge  
a deed, the  
person  
taking the

(*q*) *Re Legge*, 15 C. B. 364.

(*r*) *Re Apperton*, 1 C. B. 447.

(*s*) *Re Price*, 17 C. B. 708; *Re Booth*, 5 C. B. N. S. 541; *Re Smith*, 10 C. B. N. S. 344; *Re Edsall*, *Re*

*Thomas*, L. R. 10 C. P. 472.

(*t*) *Re Stubbs*, 4 Man. & G. 609.

(*u*) *Re Smith*, 29 W. R. 264.

(*x*) *Ex parte White*, L. R. 8 C. P. 106.



45 & 46  
Vict. c. 75,

§ 5.

3 & 4  
Will. IV.

c. 74,

§ 84.

acknow-  
ledgment  
to sign a  
memo-  
randum.

*"This deed, marked [here add some letter or other mark, for the purpose of identification,] was this day produced before me [or us] and acknowledged by                      therein named to be her act and deed; previous to which acknowledgment the said                      was examined by me [or us], separately and apart from her husband, touching her knowledge of the contents of the said deed and her consent thereto, and declared the same to be freely and voluntarily executed by her."*

The words printed in italics are not expressly repealed by the C. A. 1882, but they are superseded by rule 3 of the Rules issued under s. 7 of that Act in December, 1882, which is as follows:—

Form of  
memo-  
randum of  
acknow-  
ledgment.

Rule 3  
under  
C. A. 1882,  
§ 7. (Dec.  
1882.)

[3. The memorandum to be indorsed on or written at the foot or in the margin of a deed acknowledged by a married woman shall be in the following form in lieu of the form set forth in section 84 of the Fines and Recoveries Act:

*"This deed was this day produced before me and acknowledged by                      therein named to be her act and deed [or their several acts and deeds] previous to which acknowledgment [or acknowledgments] the said                      was [or were] examined by me separately and apart from her husband [or their respective husbands] touching her [or their] knowledge of the contents of the said deed and her [or their] consent thereto and [each of them] declared the same to be freely and voluntarily executed by her."*

The rest of s. 84, prescribing a form of certificate of acknowledgment, and the whole of ss. 85 to 88 of the F. and R. A., are repealed by the C. A. 1882.

Sects. 85 to 88 provided for the filing, indexing, and making of office copies of certificates. The effect of s. 2 of the C. A. 1882, and the new rules thereunder, is to substitute the memorandum set out above for the certificate and affidavits previously required. The following rules, made under s. 2 of the C. A. 1882, also relate to memoranda of acknowledgments:—

Rule 5  
under  
C. A. 1882,  
§ 7. (Dec.  
1882.)

[5. A memorandum of acknowledgment purporting to be signed according to any of the following forms shall be deemed to be a memorandum purporting to be signed by a person authorised to take the acknowledgment:—

(Signed)                      A. B.

A judge of the High Court of Justice in England,  
or A judge of the County Court of  
or A perpetual commissioner for taking acknowledgments of  
deeds by married women,  
or The special commissioner appointed to take the aforesaid  
acknowledgment.

But this rule is not to derogate from the effect of any memorandum

purporting to be signed by a person authorised to take the acknowledgment, though not signed in accordance with any of the above forms.]

[6. Nothing in the five preceding rules contained shall make invalid any acknowledgment which would have been valid if these rules had not been enacted.]

[7 Every commission appointing a special commissioner to take an acknowledgment by a married woman shall be returned to the office of the registrar of certificates of acknowledgments of deeds by married women, and shall be there filed. An index shall be prepared and kept in the said office, giving the names and addresses of the married women named in all such commissions filed in the said office after the 31st December, 1882. The same rules shall apply to searches in the index so to be prepared as to searches in the other indexes and registers kept in the Central Office.]

45 & 46  
Vict. c. 75,  
§ 5.

Rules 6 &  
7 under  
C. A. 1882,  
§ 7. (Dec.  
1882.)

Sect. 89 of the F. and R. A. is as follows:—

[89. And be it further enacted, that the *Lord Chief Justice of the Court of Common Pleas at Westminster* shall from time to time appoint the person who shall be the officer with whom such certificate as aforesaid shall for the time being be lodged, and may remove him at pleasure; and the *Court of Common Pleas at Westminster* shall also from time to time make such orders and regulations as the Court shall think fit touching the mode of examination to be pursued by the commissioners to be appointed under this Act, and touching the particular matters to be mentioned in such memorandums and certificates as aforesaid, and the affidavits verifying the certificates, and the time within which any of the aforesaid proceedings shall take place, and touching the amount of the fees or charges to be paid for the copies to be delivered by the clerks of the peace or their deputies, or by the officer of the said Court, as hereinbefore directed, and also of the fees or charges to be paid for taking acknowledgments of deeds and for examining married women, and for the proceedings, matters, and things required by this Act to be had, done, and executed for completing and giving effect to such acknowledgments and examinations.]

3 & 4  
Will. IV.  
c. 74,  
§ 89.

Chief  
Justice of  
Common  
Pleas to  
appoint  
the officer  
with whom  
the certifi-  
cates shall  
be lodged;  
and the  
Court to  
make  
orders  
touching  
the exami-  
nation,  
memo-  
randums,  
certifi-  
cates,  
affidavits,  
&c.

See note to s. 81, p. 375, *ante*.

[90. And be it further enacted, that in every case in which a husband and wife shall, either in or out of court, surrender

3 & 4  
Will. IV.  
c. 74,  
§ 90.

45 & 46  
Vic. c. 75,

§ 5.

2 & 4  
Will. IV.  
c. 74.

§ 90.

A married woman to be separately examined on the surrender of an equitable estate in copyholds as if such estate were legal.

into the hands of the lord of a manor any lands held by copy of court roll, parcel of the manor, and in which she alone, or she and her husband in her right, may have an equitable estate, the wife shall, upon such surrender being made, be separately examined by the person taking the surrender in the same manner as she would have been if the estate to which she alone, or she and her husband in her right, may be entitled in such lands, were an estate at law instead of a mere estate in equity; and every such surrender, when such examination shall be taken, shall be binding on the married woman and all persons claiming under her; and all surrenders heretofore made of lands similarly circumstanced, where the wife shall have been separately examined by the person taking the surrender, are hereby declared to be good and valid.]

Before surrendering copyholds a married woman ought to be separately examined by the steward or by such other persons (*e.g.*, two copyhold tenants) as the customs of the manor prescribe (*y*).

*Seemle*, that where, according to the custom of the manor, the husband's consent ought to be expressed in the surrender, and it is not so expressed, the Court will not, as against the heir of the wife, presume that such consent was given (*z*). The will of a married woman, pursuant to a surrender made before marriage, was held to be good, though executed during coverture (*a*). But where a married woman had neither surrendered her copyhold property to the use of her will, nor been separately examined pursuant to the custom of the manor, her will was held not to pass such property (*b*). A surrender by a married woman to the use of her husband with his concurrence after her separate examination, followed by his immediate admittance, will be supported (*c*).

Sect. 91 enables the Court, in a proper case, to dispense with the husband's concurrence as to copyholds as well as freeholds (*d*). It is as follows:—

3 & 4  
Will. IV.  
c. 74,  
§ 91.

[91. Provided always, and be it further enacted, that if a husband shall, in consequence of being a lunatic, idiot, or of unsound mind, and whether he shall have been found

Power to dispense

(*y*) *Driver v. Thompson*, 4 Taunt. 293.

(*z*) *Shelton v. Shelton*, 4 Nev. & Man. 857.

(*a*) *Blomfield v. Eyre*, 3 C. B. 557.

(*b*) *Nethercote v. Bartle*, 5 B. & Al. 492.

(*c*) *Scammon v. Maw*, 3 Bing. 378.

(*d*) *Ex parte Shirley*, 7 Dowl. P. C. 258.

such by inquisition or not, or shall from any other cause be incapable of executing a deed, or of making a surrender of lands held by copy of court roll, or if his residence shall not be known, or he shall be in prison, or shall be living apart from his wife, either by mutual consent or by sentence of divorce, or in consequence of his being transported beyond the seas, or from any other cause whatsoever, it shall be lawful for the Court of Common Pleas at Westminster, by an order to be made in a summary way upon the application of the wife, and upon such evidence as to the said Court shall seem meet, to dispense with the concurrence of the husband in any case in which his concurrence is required by this Act or otherwise; and all acts, deeds, or surrenders to be done, executed, or made by the wife in pursuance of such order in regard to lands of any tenure, or in regard to money subject to be invested in the purchase of lands, shall be done, executed, or made by her in the same manner as if she were a *feme sole*, and when done, executed, or made by her shall (but without prejudice to the rights of the husband as then existing independently of this Act) be as good and valid as they would have been if the husband had concurred: Provided always, that this clause shall not extend to the case of a married woman where under this Act the Lord High Chancellor, Lord Keeper or Lords Commissioners for the Custody of the Great Seal, or other the person or persons intrusted with the care and commitment of the custody of the persons, and estates of persons found lunatic, idiot, and of unsound mind, or His Majesty's High Court of Chancery, shall be the protector of a settlement in lieu of her husband.]

45 & 46  
 Vict. c. 75,  
 § 5.  
 3 & 4  
 Will IV.  
 c. 74,  
 § 91.  
 —  
 with hus-  
 band's con-  
 currence  
 in wife's  
 convey-  
 ance under  
 F. & R. A.

The husband's concurrence has been dispensed with in the following cases:—Where he was a lunatic and had resided twenty-four years apart from his wife (*e*); but he must be shown to be a lunatic at the time of the application (*f*). Where the husband was a minor (*g*). Where a husband had absconded in 1831 and not been heard of for three years (*h*). Where

(*e*) *Ex parte Thomas*, 4 Moo. & S. 331.

(*f*) *Re Turner*, 3 C. B. 166.

(*g*) *Re Haigh*, 2 C. B. N. S. 198.

(*h*) *Ex parte Gill*, 1 Bing. N. C. 168.

45 & 46  
Vict. c. 75,  
§ 5.  
3 & 4  
Will. IV.  
c. 74,  
§ 91.

When  
husband's  
concur-  
rence will  
be dis-  
pensed  
with.

he was a bankrupt and had absconded, and sailed on board an emigrant ship a few months before application (i). Where he disappeared in 1840 and had not been heard of for a year (k). Where, on an application in 1855, it appeared that he had deserted his wife in 1829, and had not been heard of since 1837 (l). Where he had deserted his wife and children, and refused to concur in the execution of the deed (m). Where he had left England two months before the application with the intention of never returning, leaving his wife and five children destitute (n). Where he had gone to America fourteen years before, and had not been heard of for eight years (o). Where the husband was a seaman and his ship was reported lost (p). Where he was a seaman and his wife had been told that he was dead by another seaman, who had been present at his funeral, and had brought her some of his effects (q). Where the parties were living apart by mutual consent and the husband refused to concur in the deed (r) unless half the purchase money was paid to him (s). Where the parties were living apart under sentence of divorce, the husband being abroad (t). Where they were living apart under a decree for judicial separation and the wife had no alimony and her husband refused to concur (u).

It has been laid down that when the parties are living apart, whether in consequence of the husband's desertion (x) or by mutual consent (y), the Court must be satisfied that the husband does not contribute to the wife's support (z), and that this fact should be expressly sworn to, and not left to the Court to infer from the circumstances of the case (a). But in a recent case, where the husband refused to concur unless he received £50 out of the purchase money, the Court dispensed with his concurrence without such evidence (b). It has also been laid down that the wife ought to prove that she was not in communication with her husband. But where, just before vacation, great inconvenience would have been caused by waiting for an affidavit to that effect, the Court made an order subject to the production of an affidavit (c).

This section of course applies to copyholds as well as to freeholds (d). The application must be supported by the affidavit of the wife (e), and

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|--|---|
| (i) <i>Ex parte Stone</i> , 9 Dowl. P. C. 843.                                       | 30.   |
| (k) <i>Re Horsfall</i> , 3 Man. & Gr. 132.   | (u) <i>Ex parte Andrews</i> , 19 C. B. N. S. 371. |
| (l) <i>Re Yarnall</i> , 17 C. B. 189.  | (x) <i>Re Carburton</i> , 16 W. R. 84.            |
| (m) <i>Re Price</i> , 13 C. B. N. S. 286.  | (y) <i>Ex parte Fish</i> , 9 C. B. N. S. 715.     |
| (n) <i>Re Kelsey</i> , 16 C. B. 197.   | (z) <i>Ex parte Robinson</i> , L. R. 4 C. P. 205. |
| (o) <i>Re Carburton</i> , 16 W. R. 84; <i>Ex parte Robinson</i> , L. R. 4 C. P. 205. | (a) <i>Re Fletcher</i> , 17 W. R. 319.            |
| (p) <i>Re Noy</i> , 7 C. B. N. S. 434.   | (b) <i>Re Caine</i> , 10 Q. B. D. 284.            |
| (q) <i>Ex parte Taylor</i> , 7 C. B. 1.  | (c) <i>Re Horsfall</i> , 3 Man. & Gr. 132.        |
| (r) <i>Re Perrin</i> , 14 C. B. 420; <i>Ex parte Fish</i> , 9 C. B. N. S. 715.       | (d) <i>Ex parte Shirley</i> , 7 Dowl. P. C. 258.  |
| (s) <i>Re Woodcock</i> , 1 C. B. 437.  | (e) <i>Ex parte Stone</i> , 9 Dowl. P. C. 840.    |
| (t) <i>Ex parte Duffill</i> , 6 Scott N. R.  |   |

she must describe herself as "the wife of" her husband (*f*), and not as "his widow" (*g*) or as "his wife or widow" (*h*), although the circumstances stated in the affidavit may be such as to lead to the conclusion that he is dead. The husband must also be properly described (*i*).

The Chancery Division has jurisdiction to make an order under this section, at any rate where an application is also made to remove the fetter on the wife's power of alienation under s. 39 of the C. A. 1881 (*k*).

As a rule the Court will not make a general order dispensing with the concurrence of the husband in future sales of his wife's property (*l*). But where the property was small and the income little more than sufficient to pay the interest of a mortgage thereon, and the husband had gone to America in 1875, and had not communicated with or contributed to the support of his wife since 1878, the Court in 1882 made a prospective order dispensing with his concurrence, in order to enable the wife to sell by auction (*m*).

An order under this section places a married woman in the same position as if she were a *feme sole*, and enables her to convey without acknowledgment (*n*).

Where an order under this section had been acted upon, and third parties had acquired rights thereunder, the Court refused to rescind it on an affidavit by the husband that he occasionally visited his wife (*o*); and though such an order may be rescinded, if obtained by fraud or suppression of material facts, strict proof of such fraud or suppression will be necessary.

Where the wife's affidavit is substantially accurate, an order founded thereon will not be rescinded (*p*).

In the following cases the Court refused to dispense with the husband's concurrence:—Where, in 1847, it appeared that the husband entered a steamer in 1844, was in New Zealand in 1845, and the wife believed that he did not intend to return, the Court considered that only a temporary absence was proved (*q*). Where a trust for sale was exerciseable at the joint request of the husband and wife, and on an application in 1858 it appeared that her husband went to Australia in 1852, and was last heard of in 1857 (*r*). Where it merely appeared that the husband was a seaman, had gone abroad, had not been heard of for many years, and the wife was informed that he was dead, but the Court had no materials to enable it to judge of the truth of such information (*s*). Where the

45 & 46  
Vict. c. 75,  
§ 5.  
3 & 4  
Will. IV.  
c. 74,  
§ 91.

Cases  
where hus-  
band's con-  
currence  
not dis-  
pensed  
with.

(*f*) *Ex parte Sparrow*, 12 C. B. 334.

(*g*) *Re Noy*, 7 Scott N. R. 434.

(*h*) *Re Anderson*, 2 C. B. N. S. 118.

(*i*) *Re Gardener*, 1 C. B. N. S. 215.

(*k*) *Ex parte Thompson*, 28 S. J. 274.

(*l*) *Re Graham*, 19 C. B. N. S. 370.

(*m*) *Re Hart*, W. N. (1882) 36.

(*n*) *Goodchild v. Dougal*, 3 Ch. D. 650.

(*o*) *Re Rogers*, L. R. 1 C. P. 47.

(*p*) *Ex parte Cockerell*, L. R. 10 C. P. 39.

(*q*) *Ex parte Gilmore*, 3 C. B. 967.

(*r*) *Re Eden*, 5 C. B. N. S. 232.

(*s*) *Ex parte Taylor*, 7 C. B. 1.

45 & 46 husband, though abroad, was in communication with and in the habit  
 Vict. c. 75, of remitting money to his wife (*t*). Where the wife had been compelled  
 § 5. to leave her husband through his brutality, and he refused to concur (*u*).  
 3 & 4 Where the husband and wife were living apart, and the husband was  
 Will. IV. nervous and excitable, but had not been asked to concur (*x*). Where no  
 c. 74, refusal by the husband to concur was proved (*y*).  
 § 91.

Sect. 92 of the F. and R. A. is as follows:—

3 & 4 [92. And be it further enacted, that this Act shall not extend  
 Will. IV. to Ireland, except where the same is expressly mentioned.]  
 c. 74,  
 § 92.  
 Ireland. Similar provisions are applied to Ireland by 4 & 5 Will. IV. c. 92, and  
 the C. A. 1882 amends the Irish Act in the same manner as it amends  
 the English F. and R. A.

#### STOCK AS SEPARATE PROPERTY.

45 & 46 6. All deposits in any post office or other savings bank, or  
 Vict. c. 75, in any other bank, all annuities granted by the Commissioners  
 § 6. for the Reduction of the National Debt or by any other person,  
 As to and all sums forming part of the public stocks or funds, or of  
 stock, &c., to which a any other stocks or funds transferable in the books of the  
 married woman is Governor and Company of the Bank of England, or of any  
 entitled. other bank, which at the commencement of this Act are  
 standing in the sole name of a married woman, and all  
 shares, stock, debentures, debenture stock, or other interests  
 of or in any corporation, company, or public body, municipal,  
 commercial, or otherwise, or of or in any industrial, provident,  
 friendly, benefit, building, or loan society, which at the com-  
 mencement of this Act are standing in her name, shall be  
 deemed, unless and until the contrary be shown, to be the  
 separate property of such married woman; and the fact that any  
 such deposit, annuity, sum forming part of the public stocks  
 or funds, or of any other stocks or funds transferable in the  
 books of the Governor and Company of the Bank of England,  
 or of any other bank, share, stock, debenture, debenture stock,

(*t*) *Re Squires*, 17 C. B. 176.  
 (*u*) *Re Price*, 13 C. B. N. S. 286.  
 (*x*) *Re Murphy*, 5 Scott N. R. 166;

*Re Mirfin*, 4 Man. & Gr. 635.  
 (*y*) *Re Trencry*, 1 C. B. N. S. 187.



or other interest as aforesaid, is standing in the sole name of a married woman, shall be sufficient *prima facie* evidence that she is beneficially entitled thereto for her separate use, so as to authorise and empower her to receive or transfer the same, and to receive the dividends, interest, and profits thereof, without the concurrence of her husband, and to indemnify the Postmaster General, the Commissioners for the Reduction of the National Debt, the Governor and Company of the Bank of England, the Governor and Company of the Bank of Ireland, and all directors, managers, and trustees of every such bank, corporation, company, public body, or society as aforesaid, in respect thereof.

45 & 46  
Vict. c. 75,  
§ 6.

Investments similar to those specified in this section could previously be made in the name of a married woman under ss. 2 to 5, inclusive, of the M. W. P. A., 1870 (*y*), which enabled any woman about to be married, or any married woman, to have deposits made in savings banks, annuities, guaranteed public stocks and funds, fully paid shares, debentures, debenture and other stock in companies, and shares in friendly, benefit, building, or loan societies, registered in her name as a married woman, entitled to her separate use. See also note to s. 7.

Invest-  
ments  
under M.  
W. P. A.  
1870.

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#### TRANSFER OF STOCK TO MARRIED WOMAN.

7. All sums forming part of the public stocks or funds, or of any other stocks or funds transferable in the books of the Bank of England or of any other bank, and all such deposits and annuities respectively as are mentioned in the last preceding section,<sup>1</sup> and all shares, stock, debentures, debenture stock, and other interests of or in any such corporation, company, public body, or society as aforesaid, which after the commencement of this Act shall be allotted to or placed, registered,<sup>2</sup> or transferred in or into or made to stand in the sole name of any married woman shall be deemed, unless and until the contrary be shown, to be her separate property, in respect of which so far as any liability may be incident

45 & 46  
Vict. c. 75,  
§ 7.

As to  
stock, &c.,  
to be  
trans-  
ferred, &c.,  
to a  
married  
woman.

(2) 33 & 34 Vict. c. 93.



45 & 46  
Vict. c. 75,  
§ 7.

thereto her separate estate shall alone be liable,<sup>3</sup> whether the same shall be so expressed in the document whereby her title to the same is created or certified, or in the books or register wherein her title is entered or recorded, or not.

Invest-  
ments in  
name of  
married  
woman.

Provided always, that nothing in this Act shall require or authorise any corporation or joint stock company to admit any married woman to be a holder of any shares or stock therein to which any liability may be incident, contrary to the provisions of any Act of Parliament, charter, byelaw, articles of association, or deed of settlement regulating such corporation or company.

Companies  
bound to  
register  
transfer to  
married  
woman.

<sup>1</sup> Compare this section with ss. 3 to 5 of the M. W. P. A., 1870 (a).

<sup>2</sup> Under s. 4 of that Act it was held that a company might be compelled, by mandamus, to register fully paid shares or stock in the name of a married woman unless some flaw existed in her title, but that the company was entitled to investigate that title (b) in order to see that no liability would be incurred by issuing a certificate to her (c). See the provision as to decision of questions under this section contained in s. 17, p. 393, *post*.

<sup>3</sup> Under the Act of 1870 a company was only bound to register fully paid shares in the name of a married woman; but if shares to which liability was attached belonged to a married woman—whether registered in her name or not—her separate estate was liable for calls (d). It will be observed that this new section is not limited to fully paid shares, but any liability for calls may be enforced against a married woman—at any rate to the extent of her separate estate—as if she were a *feme sole*.

The proviso at the end of this section was not contained in the M. W. P. A., 1870.

#### INVESTMENTS IN JOINT NAMES.

45 & 46  
Vict. c. 75,  
§ 8.

Invest  
ments in

8. All the provisions hereinbefore contained as to deposits in any post office or other savings bank, or in any other bank, annuities granted by the Commissioners for the Reduction of the National Debt or by any other person, sums forming part

- (a) 33 & 34 Vict. c. 93.  
(b) *Reg. v. Carnatic Ry. Co.*, L. R. 8 Q. B. 299.  
(c) *Batria & San Francisco Ry. Co.*, L. R. 3 Q. B. 584; *Hart v. Frontino*,

- dc.*, *Gold Mining Co.*, L. R. 5 Ex. 111.  
(d) *Matthewman's case*, L. R. 3 Eq. 781; *Butler v. Cumpston*, L. R. 7 Eq. 16; *Re London, Bombay & Mediterranean Bank*, 18 Ch. D. 581.

of the public stocks or funds, or of any other stocks or funds transferable in the books of the Bank of England or of any other bank, shares, stock, debentures, debenture stock, or other interests of or in any such corporation, company, public body, or society as aforesaid respectively, which at the commencement of this Act shall be standing in the sole name of a married woman, or which, after that time, shall be allotted to, or placed, registered, or transferred to or into, or made to stand in, the sole name of a married woman, shall respectively extend and apply, so far as relates to the estate, right, title, or interest of the married woman, to any of the particulars aforesaid which, at the commencement of this Act, or at any time afterwards, shall be standing in, or shall be allotted to, placed, registered, or transferred to or into, or made to stand in, the name of any married woman jointly with any persons or person other than her husband.

45 & 46  
Vict. c. 75,  
§ 8.  
—  
joint  
names of  
married  
women  
and others.

## TRANSFER OF SECURITIES BY MARRIED WOMEN.

9. It shall not be necessary for the husband of any married woman, in respect of her interest, to join in the transfer of any such annuity or deposit as aforesaid, or any sum forming part of the public stocks or funds, or of any other stocks or funds transferable as aforesaid, or any share, stock, debenture, debenture stock, or other benefit, right, claim, or other interest of or in any such corporation, company, public body, or society as aforesaid, which is now or shall at any time hereafter be standing in the sole name of any married woman, or in the joint names of such married woman and any other person or persons not being her husband.<sup>1</sup>

45 & 46  
Vict. c. 75,  
§ 9.  
—  
Husband's  
concur-  
rence un-  
necessary.

<sup>1</sup> This section will prevent a repetition of the difficulty which arose in *Howard v. Bank of England* (e).

(e) L. R. 19 Eq. 295.

## FRAUDULENT INVESTMENTS BY MARRIED WOMEN.

45 & 46  
Vict. c. 75,  
§ 10.

Fraudu-  
lent in-  
vestments  
with  
money of  
husband.

**10.** If any investment in any such deposit or annuity as aforesaid, or in any of the public stocks or funds, or in any other stocks or funds transferable as aforesaid, or in any share, stock, debenture, or debenture stock of any corporation, company, or public body, municipal, commercial, or otherwise, or in any share, debenture, benefit, right, or claim whatsoever in, to, or upon the funds of any industrial, provident, friendly, benefit, building, or loan society, shall have been made by a married woman by means of moneys of her husband, without his consent, the Court may, upon an application under section seventeen of this Act, order such investment, and the dividends thereof, or any part thereof, to be transferred and paid respectively to the husband; and nothing in this Act contained shall give validity as against creditors of the husband to any gift, by a husband to his wife, of any property, which, after such gift, shall continue to be in the order and disposition or reputed ownership of the husband, or to any deposit or other investment of moneys of the husband made by or in the name of his wife in fraud of his creditors; but any moneys so deposited or invested may be followed as if this Act had not passed.

Compare this section with the provisoes in ss. 2 to 5 inclusive, and with s. 6 of the M. W. P. Act, 1870 (*f*).

INSURANCES FOR BENEFIT OF FAMILY.<sup>1</sup>

45 & 46  
Vict. c. 75,  
§ 11.

Moneys  
payable  
under  
policy of  
assurance  
not to form  
part of  
estate of

**11.** A married woman may by virtue of the power of making contracts hereinbefore contained effect a policy upon her own life or the life of her husband for her separate use; and the same and all benefit thereof shall enure accordingly.

A policy of assurance effected by any man on his own life, and expressed to be for the benefit of his wife, or of his children, or of his wife and children, or any of them, or by any woman on her own life, and expressed to be for the benefit

(*f*) 33 & 34 Vict. c. 93.

of her husband, or of her children, or of her husband and children, or any of them, shall create a trust in favour of the objects therein named, and the moneys payable under any such policy shall not, so long as any object of the trust remains unperformed, form part of the estate of the insured, or be subject to his or her debts :<sup>2</sup> Provided that if it shall be proved that the policy was effected and the premiums paid with intent to defraud the creditors of the insured, they shall be entitled to receive, out of the moneys payable under the policy, a sum equal to the premiums so paid. The insured may by the policy, or by any memorandum under his or her hand, appoint a trustee or trustees<sup>3</sup> of the moneys payable under the policy, and from time to time appoint a new trustee or new trustees thereof, and may make provision for the appointment of a new trustee or new trustees thereof, and for the investment of the moneys payable under any such policy. In default of any such appointment of a trustee, such policy, immediately on its being effected, shall vest in the insured and his or her legal personal representatives, in trust for the purposes aforesaid. If, at the time of the death of the insured, or at any time afterwards, there shall be no trustee, or it shall be expedient to appoint a new trustee or new trustees, a trustee or trustees or a new trustee or new trustees may be appointed by any Court having jurisdiction under the provisions of the Trustee Act, 1850, or the Acts amending and extending the same. The receipt of a trustee or trustees duly appointed, or, in default of any such appointment, or in default of notice to the insurance office, the receipt of the legal personal representative of the insured shall be a discharge to the office for the sum secured by the policy, or for the value thereof, in whole or in part.

45 & 46  
Vict. c. 75,  
§ 11.

the in-  
sured.

Premiums  
paid in  
fraud of  
creditors.

Appoint-  
ment of  
trustees of  
policy  
money.

13 & 14  
Vict. c. 60.  
Receipts  
of trustees.

<sup>1</sup> This section is founded upon and is an extension of the provisions of s. 10 of the M. W. P. A., 1870 (*g*).

<sup>2</sup> A husband who had effected an ordinary policy in 1870, and exchanged it in 1871 for one for the benefit of his wife for her separate use if she survived him, and for the benefit of himself if he survived her, became

(*g*) 33 & 34 Vict. c. 93.

45 & 46  
Vict. c. 75,  
§ 11.

Trustees of  
policy for  
benefit of  
family.

Power of  
Court  
where no  
trusts of  
policy  
declared.

Parol  
trust for  
widow.

bankrupt and died. The premiums due subsequently to the exchange were paid out of the wife's separate estate. Held, that the policy moneys belonged to her. *Semble*, that if any of the subsequent premiums had been paid by the husband out of his own moneys, his trustee in bankruptcy would have been entitled to have the amount so paid recouped (*h*).

<sup>3</sup> The Act of 1870 gave no power to the insurer to appoint trustees. It will be observed that under this section the insurer may appoint trustees either by the policy or by a separate signed memorandum which need not be by deed. He may also make provision for the appointment of new trustees; and it will be advisable to do so by inserting a clause, either in the policy or the writing appointing the original trustees, to the effect that s. 31 of the C. A., 1881, shall apply thereto. This will avoid any question whether that section is excluded by the express power contained in this section for the Court to appoint. A petition for the appointment of trustees should be intituled "In the matter of the M. W. P. A., 1882," as well as in the matter of the Trustee Acts, although it may relate to a policy effected under the M. W. P. Act, 1870 (*i*).

Where a policy had been effected under s. 10 of the M. W. P. A., 1870 (*k*), by a husband, and no trusts were declared on the face of the policy, MALINS, V.-C., appointed trustees and directed the fund to be settled upon the usual trusts of a settlement. But on evidence that the husband died insolvent and his family were in poor circumstances, the money was distributed as on an intestacy (*l*).

This case was disapproved of and not followed by CHITTY, J., who held that the Court had no jurisdiction to do more than appoint a trustee, as s. 10 of the M. W. P. A., 1870 (like s. 11 of the M. W. P. A., 1882) does not, in terms, empower the Court to declare the rights of the parties. But he prefaced the order with the expression of his opinion that the wife, who predeceased the husband, took no interest in the fund. In giving judgment, he expressed an opinion that if she had survived, the trust would have been either for the wife for her separate use for life with remainder to the children, or for the wife and children as joint tenants (*m*).

A married man died intestate after his proposal for an insurance had been accepted, but before any policy had been issued. There was evidence that he had told the agent for the insurance company that he intended the policy to be for the benefit of his wife; and though this fact had not been communicated to the company, the Court of Appeal held that the administrator of the intestate held the policy money in trust for the widow (*n*).

(*h*) *Holt v. Everall*, 2 Ch. D. 206.

(*i*) *Re Soutar's Policy*, 26 Ch. D. 236.

(*k*) 33 & 34 Vict. c. 93.

(*l*) *Re Mellor's Policy*, 6 Ch. D. 127,

7 Ch. D. 200.

(*m*) *Re Adams' Policy*, 23 Ch. D. 525.

(*n*) *Newman v. Belsten*, 28 Sol. J. 301.

## LEGAL PROCEEDINGS BY MARRIED WOMEN.

**12.** Every woman, whether married before or after this Act, shall have in her own name against all persons whomsoever, including her husband, the same civil remedies, and also (subject, as regards her husband, to the proviso hereinafter contained) the same remedies and redress by way of criminal proceedings, for the protection and security of her own separate property,<sup>1</sup> as if such property belonged to her as a *feme sole*, but, except as aforesaid, no husband or wife shall be entitled to sue the other for a tort.<sup>2</sup> In any indictment or other proceeding under this section it shall be sufficient to allege such property to be her property; and in any proceeding under this section a husband or wife shall be competent to give evidence against<sup>3</sup> each other, any statute or rule of law to the contrary notwithstanding: Provided always, that no criminal proceeding shall be taken by any wife against her husband by virtue of this Act while they are living together, as to or concerning any property claimed by her, nor while they are living apart, as to or concerning any act done by the husband while they were living together, concerning property claimed by the wife, unless such property shall have been wrongfully taken by the husband when leaving or deserting, or about to leave or desert, his wife.

45 & 46  
Vict. c. 75,  
§ 12.

Remedies  
of married  
woman for  
protection  
and security  
of  
separate  
property.

<sup>1</sup> Where a wife had filed a petition for divorce, and her husband had ceased to cohabit with her, an injunction was granted to restrain him, until the trial of an action by the wife to administer the trusts of the settlement, from entering or interfering with a house in which the wife resided, and which was settled on her for her separate use (o).

Injunction  
against  
husband.

This section gives power to a married woman to take proceedings as if she were a *feme sole*, for the protection and security of her own separate property, but it appears to be limited to proceedings for such protection. But under s. 1, together with this section, she has power to sue generally as a *feme sole*, and she can so sue in respect of injuries which do not affect her separate estate. Long before this Act Courts of Equity

(o) *Symonds v. Hallitt*, 24 Ch. D. 346.

45 & 46 Vict. c. 75, § 12. had "firmly established the independent personality of a *feme covert* with respect to property settled to her separate use."—*Per* LORD WESTBURY, C. (*p*).

**Actions by married women before 1883.** But before 1870 it was necessary for her in all proceedings during coverture relating to her separate estate, to sue by a next friend, though of course she might, after her husband's death, maintain an action, either before or after 1870, with regard to her separate estate, either against her husband's legal personal representatives or other persons in her own name (*q*).

Section 11 of the M. W. P. A., 1870 (*r*), of which this section is an extension, enabled a married woman for the first time to maintain an action during coverture in her own name for the recovery, protection, and security of her separate property under that Act. It was accordingly held that a married woman who kept a banking account for her separate business could maintain an action against her bankers for neglecting to present a bill of exchange paid by her to the credit of that account, such an action being for the protection of her separate estate. But it was doubted whether she could maintain an action for breach of contract generally in respect of her separate estate (*s*). The words of this section "for the protection and security," are the same as in s. 11 of the previous Act, but the words "and redress" are added after "remedies," and therefore the doubt so expressed is not set at rest as it would have been if the words of the new section had been "in respect of her separate estate." It is probable, however, that the Court would consider an action for breach of contract relating to her separate estate as a remedy for the protection and security of such property.

**Action for torts.** <sup>2</sup> The proviso that no wife may sue her husband for a tort, except in respect of her separate property, implies that she may sue other persons for torts generally, and she may do so as a *feme sole*. See cases cited under s. 1 (*t*).

A woman cannot, even after divorce, sue her former husband for an assault committed during coverture, though after decree for divorce absolute, or decree for judicial separation, or after a protection order under s. 21 of the Divorce Act, 1857 (*u*) she could sue generally as a *feme sole* (*v*). But after decree *nisi* for a divorce she remains under coverture until decree absolute (*x*), and though the decree absolute, when pronounced, relates back to the date of decree *nisi*, so as to render invalid any dealing with the wife's property by the husband in the interval (*y*), it

(*p*) *Woodward v. Woodward*, 11 W. R. 1008.

(*q*) *Woodward v. Woodward*, 11 W. R. 1007; *Green v. Carlill*, 4 Ch. D. 882.

(*r*) 33 & 34 Vict. c. 93.

(*s*) *Summers v. City Bank*, L. R. 9

C. P. 580.

(*t*) P. 357, *ante*.

(*u*) 20 & 21 Vict. c. 85.

(*v*) *Ramsden v. Brearley*, L. R. 10 Q. B. 147.

(*x*) *Norman v. Villars*, 2 Ex. D. 359.

(*y*) *Prole v. Soady*, L. R. 3 Ch. 220



does not give her the status of a *feme sole* from the date of the decree nisi (z). 45 & 46  
Vict. c. 75,  
§ 12.

As to the effect of divorce on the husband's and wife's respective rights to property under a marriage settlement and otherwise, see the cases cited below (a). It may here be mentioned that a suit for dissolution of marriage may be maintained by or against the committee of a lunatic (b). Evidence  
by wife  
against  
husband.

Though this section enables a wife to give evidence against her husband (c) it will be observed that it does not authorise husband and wife to give evidence *in favour* of each other. In civil proceedings they are competent and compellable to do so (d), but in criminal proceedings they are not (e). This section does not appear to affect the rule that no husband or wife shall be compellable to disclose any communication made by the other during coverture (f). But a written statement handed by a wife to a policeman in the presence of her husband, as his statement, without demur by him was held admissible in evidence against him (g). See s. 16 (h) of this Act and s. 1 of the M. W. P. A. 1884 (i), which renders husbands and wives compellable to give evidence against each other in criminal proceedings.

## WIFE'S LIABILITY FOR ANTE-NUPTIAL DEBTS.

**13.** A woman after her marriage shall continue to be liable in respect and to the extent of her separate property for all debts contracted, and all contracts entered into or wrongs committed by her before her marriage, including any sums for which she may be liable as a contributory, either before or after she has been placed on the list of contributories, under and by virtue of the Acts relating to joint stock companies; and she may be sued for any such debt and for any liability in damages or otherwise under any such contract, or in respect of any such wrong; and all sums recovered against her in respect thereof, or for any costs relating thereto, shall be payable out of her separate property; and, as between her and her husband, unless there be any contract 45 & 46  
Vict. c. 75,  
§ 13.  
Wife's  
ante-  
nuptial  
debts and  
liabilities.

(z) *Norman v. Villars*, 2 Ex. D. 359;  
*Hulse v. Tavernor*, L. R. 2 P. & D. 259.

(a) *Wilkinson v. Gibson*, L. R. 4 Eq. 162; *Burton v. Sturgeon*, 2 Ch. 1). 318, and *Fitzgerald v. Chapman*, 1 Ch. D. 563, overruling *Jessop v. Blake*, 3 Giff. 639; *Swift v. Wenman*, L. R. 10 Eq. 15, and *Fussell v. Dowding*, L. R. 14 Eq. 421.

(b) *Baker v. Baker*, 2 P. D. 142;

*Mordaunt v. Moncrieff*, L. R. 2 H. L. (Sc.) 374.

(c) *Reg. v. Brittleton*, 12 Q. B. D. 266.

(d) 16 & 17 Vict. c. 83, § 1.

(e) *Tayl. Evid.*, 7th ed., 1144.

(f) 16 & 17 Vict. c. 83, § 3.

(g) *Reg. v. Ma'lory*, 13 Q. B. D. 33.

(h) P. 397, *post*.

(i) P. 398, *post*.



45 & 46  
Vict. c. 75,  
§ 13.

Liability  
of wife for  
her ante-  
nuptial  
debts and  
torts.

between them to the contrary, her separate property shall be deemed to be primarily liable for all such debts, contracts, or wrongs, and for all damages or costs recovered in respect thereof: Provided always, that nothing in this Act shall operate to increase or diminish the liability of any woman married before the commencement of this Act for any such debt, contract, or wrong, as aforesaid, except as to any separate property to which she may become entitled by virtue of this Act, and to which she would not have been entitled for her separate use under the Acts hereby repealed or otherwise, if this Act had not passed.<sup>1</sup>

<sup>1</sup> Before this Act the separate property of a married woman was not liable for her general torts (*g*). But it was liable for debts incurred by her previously to her marriage (*h*), and this liability extended to and could be enforced against property belonging to her before her marriage and settled at marriage for her separate use (*i*), although it was so settled without power of anticipation (*k*).

#### HUSBAND'S LIABILITY FOR ANTE-NUPTIAL DEBTS.

45 & 46  
Vict. c. 75,  
§ 14.

Husband  
to be liable  
for his  
wife's  
debts con-  
tracted  
before  
marriage  
to a  
certain  
extent.

14. A husband shall be liable for the debts of his wife contracted, and for all contracts entered into and wrongs committed by her before marriage, including any liabilities to which she may be so subject under the Acts relating to joint stock companies as aforesaid to the extent of all property whatsoever belonging to his wife which he shall have acquired or become entitled to from or through his wife, after deducting therefrom any payments made by him, and any sums for which judgment may have been *bond fide* recovered against him in any proceeding at law, in respect of any such debts, contracts, or wrongs for or in respect of which his wife was liable before her marriage as aforesaid; but he shall not be liable for the same any further or otherwise; and any court in which a husband shall be sued for any such debt shall

(*g*) *Wainford v. Heyl*, L. R. 20 Eq. 321.

(*h*) *Williams v. Mercier*, 9 Q. B. D. 337.

(*i*) *Chubb v. Stretch*, L. R. 9 Eq. 555.

(*k*) *Sanger v. Sanger*, L. R. 11 Eq. 470; *London & Provincial Bank v. Boyle*, 7 Ch. D. 773.

have power to direct any inquiry or proceedings which it may think proper for the purpose of ascertaining the nature, amount, or value of such property: Provided always, that nothing in this Act contained shall operate to increase or diminish the liability of any husband married before the commencement of this Act for or in respect of any such debt or other liability of his wife as aforesaid.<sup>1</sup>

45 & 46  
Vict. c. 75,  
**§ 14.**  
Saving as  
to husband  
married  
before  
1 Jan.,  
1883.

<sup>1</sup> This section is founded upon the repealed M. W. P. A. of 1874 (*l*). The provision that the husband may deduct from the amount of his liability any sums for which judgment has been *bonâ fide* recovered against him, is substituted for the last clause of s. 5 of that Act, which is as follows:

[*Provided that when the husband, after marriage, pays any debt of his wife, or has a judgment bonâ fide recovered against him in any such action as is in this Act mentioned, then to the extent of such payment or judgment the husband shall not in any subsequent action<sup>2</sup> be liable.*]

37 & 38  
Vict. c. 50,  
**§ 5.**

<sup>2</sup> It was held that "subsequent action" meant any action subsequent to the commencement of the action in which judgment was recovered, and was not limited to the actions subsequent to the judgment (*m*).

A husband is not liable, after his wife's death, for goods supplied to her before marriage (*n*).

A Englishman married and living in England was held liable only to the extent specified in the M. W. P. A., 1874 (*o*), though his wife's ante-nuptial debt was contracted in Jersey, to which island the Act does not apply (*p*).

The practical effect on a husband's liability of the M. W. P. A. of 1870, 1874 and 1883, is as follows:

Husband's  
liability  
for wife's  
ante-nup-  
tial debts  
and torts.

- (a) A husband married before the 9th of August, 1870, is liable generally for the ante-nuptial debts and torts of his wife, whether he acquired any property with her or not.
- (β) A husband married between the 9th of August, 1870, and the 30th of July, 1874, is not liable for any ante-nuptial debts or torts of his wife, whether he acquired any property with her or not.
- (γ) A husband married between the 30th of July, 1874, and the 1st of January, 1883, is liable for his wife's ante-nuptial debts

(*l*) 37 & 38 Vict. c. 50.

(*m*) *Fear v. Castle*, 8 Q. B. D. 382.

(*n*) *Bull v. Stocker*, 10 Q. B. D. 129.

(*o*) 37 & 38 Vict. c. 50.

(*p*) *De Greuchy v. Wills*, 4 C. P. D.

362.

45 & 46  
Vict. c. 75,  
**§ 14.**

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and torts to the extent of the value of any property which he has actually acquired from his wife (or so far as *choses in action*, rents, and other income are concerned, which he might by due diligence have reduced into possession or acquired), and also to the extent of any of her property settled or transferred with the view of defeating or delaying her ante-nuptial creditors.

- (8) A husband married after the 1st of January, 1883, is liable for his wife's ante-nuptial debts and torts only to the extent of property which he has acquired from or through his wife—which, in the absence of a settlement, will be none, as under s. 5 all the wife's property will, in such a case, be her separate estate. Moreover, even where there is a settlement, the wife's separate estate will, in the absence of an agreement to the contrary, be liable to indemnify the husband for any liability incurred by him.
- 

#### ACTIONS FOR ANTE-NUPTIAL DEBTS.<sup>1</sup>

45 & 46  
Vict. c. 75,  
**§ 15.**

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Action for  
ante-  
nuptial  
liabilities.  
Husband  
and wife  
may be  
sued  
jointly.

**15.** A husband and wife may be jointly sued in respect of any such debt or other liability (whether by contract or for any wrong) contracted or incurred by the wife before marriage as aforesaid, if the plaintiff in the action shall seek to establish his claim, either wholly or in part, against both of them; and if in any such action, or in any action brought in respect of any such debt or liability against the husband alone, it is not found that the husband is liable<sup>2</sup> in respect of any property of the wife so acquired by him, or to which he shall have become so entitled as aforesaid, he shall have judgment for his costs of defence, whatever may be the result of the action against the wife if jointly sued with him; and in any such action against husband and wife jointly, if it appears that the husband is liable for the debt or damages recovered, or any part thereof, the judgment to the extent of the amount for which the husband is liable shall be a joint judgment against the husband personally, and against the wife as to her separate property<sup>3</sup>; and as to the residue, if any, of such debt and damages, the judgment shall be a separate judgment against the wife as to her separate property only.

This section is founded upon but is an extension of ss. 1, 3 and 5 of the M. W. P. A., 1874 (*q*). 45 & 46  
Vict. c. 75

Where it is desired to proceed against the wife's separate estate only, neither her husband (*r*) nor her trustees, if any (*s*) need be joined as defendants. § 15.

<sup>2</sup> Where the husband is sued it is unnecessary to allege that he has received assets of his wife. If he is desirous of relying upon this section he must do so in his defence (*t*).

<sup>3</sup> It will be observed that though a *personal* judgment may be recovered against the husband the judgment against the wife can be only as to her separate property. It would therefore appear that the rule that a married woman cannot be made personally liable, either in contract or in tort, is not affected (*u*). See cases as to judgments against married women cited under s. 1 (*v*).

#### CRIMINAL LIABILITY OF MARRIED WOMAN.

**16.** A wife doing any act with respect to any property of her husband, which, if done by the husband with respect to property of the wife, would make the husband liable to criminal proceedings by the wife under this Act, shall in like manner be liable to criminal proceedings by her husband. 45 & 46  
Vict. c. 75,  
§ 16.

Where a married woman and a man with whom she had eloped were indicted for stealing goods of the woman's husband, it was held that the husband's evidence was not admissible against either of the prisoners, either under this section or under s. 12 (*x*). In consequence of this decision, the M. W. P. A., 1884 (*y*), was passed on the 23rd of June, 1884. It is as follows:—

*[An Act to amend the sixteenth section of the Married Women's Property Act, 1882.]*

[Whereas by section sixteen of the Married Women's Property Act, 1882, a wife is, under the circumstances therein mentioned, declared to be liable to criminal proceedings by her husband, and a doubt has arisen as to whether the husband is admissible as a witness against his wife in such criminal 47 & 48  
Vict. c. 14.  
Preamble.

(*q*) 37 & 38 Vict. c. 50.

(*r*) *Williams v. Mercier*, 9 Q. B. D. 722.

337.

(*s*) *Davies v. Jenkins*, 6 Ch. D. 728.

(*t*) *Matthews v. Whittle*, 13 Ch. D. 811.

(*u*) *Atwood v. Chichester*, 8 Q. B. D.

722.

(*v*) P. 357—8, *ante*.

(*x*) *Reg. v. Brittleton*, 12 Q. B. D. 266.

(*y*) 47 & 48 Vict. c. 14.

45 & 46  
Vict. c. 75.  
**§ 16.**

47 & 48  
Vict. c. 14,  
**§§ 1, 2.**

Husband  
or wife  
competent  
witness in  
criminal  
proceed-  
ings under  
45 & 46  
Vict. c. 75.  
Short  
title.

proceedings, while section twelve of the same Act declares that in any proceeding under that section a husband or wife shall be competent to give evidence against each other; and it is desirable that the said doubt should be removed, and the said Act otherwise amended.]

[Be it therefore enacted, &c.]

[1. In any such criminal proceeding against a husband or a wife as is authorised by the Married Women's Property Act, 1882, the husband and wife respectively shall be competent and admissible witnesses, and, except when defendant, compellable to give evidence.]

[2. This Act may be cited as the Married Women's Property Act, 1884, and this Act and the Married Women's Property Act, 1882, may be cited together as the Married Women's Property Acts, 1882 and 1884.]

It should be observed that this section goes further than either s. 12 or s. 16 of the M. W. P. A. 1882, in making husband and wife compellable as well as competent to give evidence.

#### QUESTIONS BETWEEN HUSBAND AND WIFE.

45 & 46  
Vict. c. 75,  
**§ 17.**

Questions  
between  
husband  
and wife  
as to pro-  
perty to be  
decided in  
a summary  
way.

**17.** In any question between husband and wife as to the title to or possession of property, either party, or any such bank, corporation, company, public body, or society as aforesaid in whose books any stocks, funds, or shares of either party are standing, may apply by summons or otherwise in a summary way to any judge of the High Court of Justice in England or in Ireland, according as such property is in England or Ireland, or (at the option of the applicant irrespectively of the value of the property in dispute) in England to the judge of the county court of the district, or in Ireland to the chairman of the civil bill court of the division in which either party resides, and the judge of the High Court of Justice or of the county court, or the chairman of the civil bill court (as the case may be), may make such order with respect to the property in dispute, and as to the costs of and consequent on the application as he thinks fit, or may direct such application to stand over from time to time, and any inquiry touching the

matters in question to be made in such manner as he shall think fit: Provided always, that any order of a judge of the High Court of Justice to be made under the provisions of this section shall be subject to appeal in the same way as an order made by the same judge in a suit pending or on an equitable plaint in the said court would be; and any order of a county or civil bill court under the provisions of this section shall be subject to appeal in the same way as any other order made by the same court would be, and all proceedings in a county court or civil bill court under this section in which, by reason of the value of the property in dispute, such court would not have had jurisdiction if this Act or the Married Women's Property Act, 1870, had not passed, may, at the option of the defendant or respondent to such proceedings, be removed as of right into the High Court of Justice in England or Ireland (as the case may be), by writ of certiorari or otherwise as may be prescribed by any rule of such High Court; but any order made or act done in the course of such proceedings prior to such removal shall be valid, unless order shall be made to the contrary by such High Court: Provided also, that the judge of the High Court of Justice or of the county court, or the chairman of the civil bill court, if either party so require, may hear any such application in his private room: Provided also, that any such bank, corporation, company, public body, or society as aforesaid, shall, in the matter of any such application for the purposes of costs or otherwise, be treated as a stakeholder only.

45 & 46  
Vict. c. 75,  
§ 17.

Decision of  
question  
between  
husband  
and wife

MARRIED WOMAN AS TRUSTEE.

**18.** A married woman who is an executrix or administratrix alone or jointly with any other person or persons of the estate of any deceased person, or a trustee alone or jointly as aforesaid of property subject to any trust, may sue or be sued, and may transfer or join in transferring any such annuity or deposit as aforesaid, or any sum forming part of the public stocks or funds, or of any other stocks or funds transferable

45 & 46  
Vict. c. 75,  
§ 18.

Married  
woman as  
an exe-  
cutrix or  
trustee.

45 & 46  
Vict. c. 75,  
**§ 18.**

as aforesaid, or any share, stock, debenture, debenture stock, or other benefit, right, claim, or other interest of or in any such corporation, company, public body, or society in that character, without her husband, as if she were a *feme sole*.

See s. 24, p. 405, *post*, and notes to s. 6 of the V. & P. Act, 1874, p. 202, *ante*.

#### SAVING AS TO SETTLEMENTS.

45 & 46  
Vict. c. 75,  
**§ 19.**

Saving of  
existing  
settle-  
ments,  
and the  
power to  
make  
future  
settle-  
ments.

**19.** Nothing in this Act contained shall interfere with or affect any settlement or agreement for a settlement made or to be made, whether before or after marriage, respecting the property of any married woman,<sup>1</sup> or shall interfere with or render inoperative any restriction against anticipation<sup>2</sup> at present attached or to be hereafter attached to the enjoyment of any property or income by a woman under any settlement, agreement for a settlement, will, or other instrument; but no restriction against anticipation contained in any settlement or agreement for a settlement of a woman's own property to be made or entered into by herself shall have any validity against debts contracted by her before marriage, and no settlement or agreement for a settlement shall have any greater force or validity against creditors of such woman than a like settlement or agreement for a settlement made or entered into by a man would have against his creditors.<sup>3</sup>

The restraint on anticipation may be removed by the Court under s. 39 of the C. A., 1881 (*y*), which is as follows:—

44 & 45  
Vict. c. 41,  
**§ 39.**

Power for  
Court to  
bind  
interest of  
married  
woman.

[39 (1.) Notwithstanding that a married woman is restrained from anticipation, the Court, may, if it thinks fit, where it appears to the Court to be for her benefit, by judgment or order,<sup>4</sup> with her consent,<sup>5</sup> bind her interest in any property.<sup>6</sup>

(2.) This section applies only to judgments or orders made after the commencement of this Act.]

(*y*) 44 & 45 Vict. c. 41.



<sup>1</sup> Where a married woman, after the commencement of this Act, became absolutely entitled to a bequest without any limitation as to separate use, it was held that s. 19 exempted her marriage settlement, made in 1862, and containing a clause for the settlement of after-acquired property, from the 5th and other sections and that the bequest must be dealt with as if the Act had not been passed (*y*). 45 & 46  
Vict. c. 75,  
§ 19.  
44 & 45  
Vict. c. 41,  
§ 39.

<sup>2</sup> The restraint on anticipation can be attached only to the separate use. The separate use, with or without restraint on alienation, may be expressly limited to a particular coverture (*z*), but unless words so expressly limiting it are employed (*a*), the separate use and the restraint will revive on any subsequent -coverture (*b*), except as to property not disposed of by the married woman while discovert. But, it takes effect only during coverture (*c*). A woman may therefore, either before marriage or while a widow, dispose either of future income or of capital which she is restrained from anticipating or alienating. For the fetter on alienation may be so extended as to apply not only to a life interest, but to any larger estate or interest in real or personal property, though it will, in that case also, take effect only during coverture (*d*). And even during coverture it applies only to property actually producing income. Thus, a sum of cash to which a married woman becomes entitled for her separate use without power of anticipation, may be paid to her (though under coverture) on her separate receipt (*e*). But an income-producing fund to which she becomes similarly entitled cannot be paid or transferred to her during coverture (*f*). And where funds were held in trust for a married woman for life for her separate use, and after her death upon such trusts as she should by will appoint, and in default to the only child of the marriage, the fund was, after the death of the husband, with the consent of the only child (who had attained twenty-one), allowed to be transferred to the wife absolutely (*g*). Even during coverture property may be settled upon a married woman in such a way that the separate use, and therefore the restraint on anticipation, will only arise in the event of a future marriage (*h*). Restraint  
on aliena-  
tion.

<sup>3</sup> But except in cases where property was settled without power of anticipation in fraud of ante-nuptial creditors, as to which the provision of this section corresponds with the previous rule of equity (*i*), the Restraint  
good  
against  
creditors

- |   |   |
|---|---|
| <p>(<i>y</i>) <i>Re Stonor's Trusts</i>, 24 Ch. D. 195.<br/>                 (<i>z</i>) <i>King v. Lucas</i>, 23 Ch. D. 712.<br/>                 (<i>a</i>) <i>Moore v. Morris</i>, 4 Drew. 33.<br/>                 (<i>b</i>) <i>Re Gaffee</i>, 1 M. &amp; G. 541; <i>Tullett v. Armstrong</i>, 1 B. 1, 4 M. &amp; C. 377, 390; <i>Hawkes v. Hubback</i>, L. R. 11 Eq. 5; <i>Baggett v. Meux</i>, 1 Coll. 133.<br/>                 (<i>c</i>) <i>Barton v. Briscoe</i>, Jac. 603.<br/>                 (<i>d</i>) <i>Baggett v. Meux</i>, 1 Coll. 138.<br/>                 (<i>e</i>) <i>Re Croughton's Trusts</i>, 8 Ch. D.</p> | <p>460; <i>Re Clarke's Trusts</i>, 21 Ch. D. 748.<br/>                 (<i>f</i>) <i>Re Ellis Trusts</i>, L. R. 17 Eq. 409; <i>Re Benton</i>; <i>Smith v. Benton</i>, 19 Ch. D. 277. Compare <i>Re Michael</i>, W. N. (1877) 134.<br/>                 (<i>g</i>) <i>Barton v. Briscoe</i>, Jac. 603.<br/>                 (<i>h</i>) <i>King v. Lucas</i>, 23 Ch. D. 712.<br/>                 (<i>i</i>) <i>Sanger v. Sanger</i>, L. R. 11 Eq. 470; <i>London &amp; Provincial Bank v. Bogle</i>, 7 Ch. D. 773.</p> |
|---|---|



45 & 46  
Vict. c. 75,  
§ 19.

44 & 45  
Vict. c. 41,  
§ 39.

before  
1333.

fetter upon alienation could not be evaded so as to render the future income of a married woman liable to her creditors (*k*), nor could they attach in the hands of her trustees income which accrued between judgment and the attempt to attach it (*l*). Where a married woman, who was restrained from anticipating her separate estate, joined her husband and mother in a promissory note which did not become due till after her husband's death, it was held that she was not liable upon it, though she would have been if her separate estate had not been subject to the fetter (*m*). A woman cannot dispose, by way of anticipation, of alimony payable to her under a decree for judicial separation (*n*).

<sup>4</sup> Though orders have been made on petition (*o*), applications under this section should be made by summons in chambers and not by petition (*p*).

"I have had several applications before me where it has appeared that the removal of the restraint on anticipation was for the benefit of the husband. I do not put that construction on the section, and I shall require very strong grounds to be presented to me before acceding to such an application." Per HALL, V.-C. (*q*).

<sup>5</sup> In *Hodges v. Hodges* (*r*), FRY, L.J. (then FRY, J.) said: "I have felt some doubt whether I ought not to require the applicant's consent to be given in the ordinary formal way by a separate examination. I have, however, been informed that in other branches of the Court this formal consent has not been required, and therefore I shall not require it on the present occasion. At the same time I think it is well worthy of consideration whether a separate examination of the married woman, ought not to be required in such cases, for I think there is a great danger of applications of this kind being made of which the married woman may know nothing. In the present case I have evidence which satisfies me of the wish of the lady herself, and therefore I make the order asked for."

<sup>6</sup> An order was made under this section to enable a married woman to make a valid compromise of her claim in an administration action (*s*).

A fund in Court was settled in trust for a married woman for her separate use for life, without power of anticipation, with remainder in default of issue, as she should by will appoint, and in default of appointment to herself absolutely. She had no children, was past the age of

(*k*) *Arnold v. Woodhams*, L. R. 16 Eq. 29; *Stanley v. Stanley*, 7 Ch. D. 589; *Bursill v. Tanner*, 32 W. R. 827.

(*l*) *Chapman v. Biggs*, 11 Q. B. D. 27.

(*m*) *Roberts v. Watkins*, 46 L. J. 552.

(*n*) *Re Robinson*, W. N. (1884), p. 169.

(*o*) *Tamplin v. Miller*, 30 W. R. 422; *Re Landfield*; *Landfield v. Land-*

*field*, 30 W. R. 377.

(*p*) *Re Lillwall's Settlement*, 30 W. R. 243.

(*q*) *Tamplin v. Miller*, 30 W. R. 422.

(*r*) 20 Ch. D. 753.

(*s*) *Tamplin v. Miller*, 30 W. R. 422; *Musgrave v. Sandeman*, 48 L. T. 215.

child-bearing, and was being pressed by creditors. The Court, following *Re Harvey* (t), held that any appointment she might make by will would be subject to her debts, and, therefore, removed the restraint on anticipation, and allowed a portion of the fund to be paid out to her. Her consent was gathered from an affidavit by her and from letters to her solicitors (u). 45 & 46  
Vict. c. 75,  
§ 19.  
41 & 45  
Vict. c. 41,  
§ 39.

Where a married woman who had been separated from her husband for more than twenty-five years and was carrying on business apart from him applied for an order, under 20 & 21 Vict. c. 57, s. 2, dispensing with his consent to an assignment of her reversionary interest in personal property, and, under this section, the removal of restraint upon anticipation, CHITTY, J., having regard to the circumstances of the case, made the order asked for but declined to say whether he would have made such an order in a simple case without the consent of the husband (v).

Where on a petition, under the Settled Estates Act, 1877, an order is made binding the interest of a married woman restrained from anticipation, the petition need not be intituled under the C. A., 1881 (x).

#### MAINTENANCE OF PAUPER HUSBAND.

**20.** Where in England the husband of any woman having separate property becomes chargeable to any union or parish, the justices having jurisdiction in such union or parish may, in petty sessions assembled, upon application of the guardians of the poor, issue a summons against the wife, and make and enforce such order against her for the maintenance of her husband out of such separate property<sup>1</sup> as by the thirty-third section of the Poor Law Amendment Act, 1868, they may now make and enforce against a husband for the maintenance of his wife if she becomes chargeable to any union or parish.<sup>2</sup> Where in Ireland relief is given under the provisions of the Acts relating to the relief of the destitute poor to the husband of any woman having separate property, the cost price of such relief is hereby declared to be a loan from the guardians of 45 & 46  
Vict. c. 75,  
§ 20.  
Married  
woman to  
be liable to  
the parish  
for the  
mainten-  
ance of her  
husband.

(t) 13 Ch. D. 216.

(u) *Hodges v. Hodges*, 20 Ch. D. 749. Compare *Paul v. Paul*, 20 Ch. D. 742; overruling *Paul v. Paul*, 15 Ch. D. 580.

(v) *Ex parte Thompson*, W. N. (1884) p. 28.

(x) *Re Landfield; Landfield v. Landfield*, 30 W. R. 377.

<sup>45 & 46</sup>  
<sup>Vict. c. 75,</sup>  
**§ 20.** the union in which the same shall be given, and shall be recoverable from such woman as if she were a feme sole by the same actions and proceedings as money lent.

<sup>1</sup> This section is copied from s. 13 of the M. W. P. A., 1870, with the addition of the words "out of such separate property."

<sup>2</sup> Under 31 & 32 Vict. c. 122, s. 33, the justices may order a husband to make his wife a weekly allowance according to his circumstances, although it may exceed their previous allowance as relief (*y*).

### MAINTENANCE OF CHILDREN, &c.

<sup>45 & 46</sup>  
<sup>Vict. c. 75,</sup>  
**§ 21.** **21.** A married woman having separate property shall be subject to all such liability for the maintenance of her children and grandchildren<sup>1</sup> as the husband is now by law subject to for the maintenance of her children and grandchildren: Provided always, that nothing in this Act shall relieve her husband from any liability imposed upon him by law to maintain her children or grandchildren.

Married woman to be liable to the parish for the maintenance of her children.

<sup>1</sup> This section is founded upon s. 14 of the M. W. P. A., 1870, which did not, however, extend to grandchildren.

### REPEALS.

<sup>45 & 46</sup>  
<sup>Vict. c. 75,</sup>  
**§ 22.** **22.** The Married Women's Property Act, 1870, and the Married Women's Property Act, 1870, Amendment Act, 1874, are hereby repealed: Provided that such repeal shall not affect any act done or right acquired while either of such Acts was in force, or any right or liability of any husband or wife, married before the commencement of this Act, to sue or be sued under the provisions of the said repealed Acts or either of them, for or in respect of any debt, contract, wrong, or other matter or thing whatsoever, for or in respect of which any such right or liability shall have accrued to or against such husband or wife before the commencement of this Act.

Repeal of 33 & 34 Vict. c. 93, 37 & 38 Vict. c. 50.

As to the effect of this section, see *Re Soutar's Policy* (*z*).

(*y*) *Dinning v. South Shields Union*, 13 Q. B. D. 25.      (*z*) 26 Ch. D. 236.

MARRIED WOMAN'S LEGAL PERSONAL REPRESENTATIVE.

45 & 46  
Vict. c. 75,  
**§ 23.**

**23.** For the purposes of this Act the legal personal representative of any married woman shall in respect of her separate estate have the same rights and liabilities and be subject to the same jurisdiction as she would be if she were living.

Legal  
representa-  
tive of  
married  
woman.

INTERPRETATION CLAUSE.

**24.** The word "contract" in this Act shall include the acceptance of any trust, or of the office of executrix or administratrix, and the provisions of this Act as to liabilities of married women shall extend to all liabilities by reason of any breach of trust or devastavit committed by any married woman being a trustee or executrix or administratrix either before or after her marriage, and her husband shall not be subject to such liabilities unless he has acted or intermeddled in the trust or administration. The word "property" in this Act includes a thing in action.

45 & 46  
Vict. c. 75,  
**§ 24.**  
Interpre-  
tation of  
terms.

This section and s. 1 enable a married woman to accept a grant of administration without her husband's consent; and it is no longer necessary for him to concur in the administration bond (*y*).

COMMENCEMENT.

**25.** The date of the commencement of this Act shall be the first of January one thousand eight hundred and eighty-three.

45 & 46  
Vict. c. 75,  
**§ 25.**

Com-  
mence-  
ment of  
Act.

EXTENT.

**26.** This Act shall not extend to Scotland.

45 & 46  
Vict. c. 75,  
**§ 26.**

SHORT TITLE.

**27.** This Act may be cited as the Married Women's Property Act, 1882.

Extent of  
Act.

45 & 46  
Vict. c. 75,  
**§ 27.**

(*y*) *Re Ayres*, 8 P. D. 168.

Short  
title.

# THE SETTLED ESTATES ACT, 1877.

40 & 41 VICT. C. 18.

*An Act to consolidate and amend the Law relating to  
Leases and Sales of Settled Estates.*

40 & 41  
Vict. c. 18.  
Preamble. WHEREAS it is expedient to consolidate and amend the law  
relating to leases and sales of settled estates :<sup>1</sup>

Be it enacted, &c.

Settled  
Estates  
Act repeals  
and con-  
solidates  
provisions  
of five  
previous  
Acts.

<sup>1</sup> The original Leases and Sales of Settled Estates Act (a) was passed in 1856, and was amended by four successive Acts passed in 1858, 1864, 1874, and 1876 respectively ; and as further amendments had been suggested, it was very desirable that all the old Acts should be repealed, and their provisions, with the necessary amendments, embodied in a consolidated form in a new Act. "The Settled Estates Act, 1877," accordingly repeals (b) the Acts of 1856, 1858, 1864, 1874 and 1876, and re-enacts their provisions with amendments. Some of the sections of the Act of 1877 are copied *verbatim* from the repealed Acts, and some are copied with merely verbal alterations. Others contain provisions of the earlier Acts with amendments, and some few are entirely new. In the notes to each section of the Act of 1877 it is proposed to point out with what section of the repealed Acts (if any) it corresponds, and whether the old section has been re-enacted *verbatim*, or with any and what alterations. Such of the cases decided under the repealed Acts as are applicable to the Act of 1877, will also be referred to in the notes.

40 & 41  
Vict. c. 18, § 1. 1. This Act may be cited for all purposes as "The Settled  
Estates Act, 1877."

Short title.

(a) 19 & 20 Vict. c. 20.

(b) Sect. 58.

## MEANING OF "SETTLED ESTATES."

**2.**<sup>1</sup> The word "settlement" as used in this Act shall signify any Act of Parliament, deed, agreement, copy of court roll, will, or other instrument, or any number of such instruments, under or by virtue of which any hereditaments of any tenure or any estates or interests in any such hereditaments stand limited to or in trust for any persons by way of succession, including any such instruments affecting the estates of any one or more of such persons exclusively.<sup>2</sup>

40 & 41  
Vict. c. 18,  
§ 2.

Interpre-  
tation of  
"settle-  
ment" and  
"settled  
estates."

The term "settled estates"<sup>3</sup> as used in this Act shall signify all hereditaments of any tenure,<sup>4</sup> and all estates or interests in any such hereditaments, which are the subject of a settlement; and for the purposes of this Act a tenant-in-tail after possibility of issue extinct shall be deemed to be a tenant for life.

All estates or interests in remainder or reversion not disposed of by the settlement, and reverting to a settlor or descending to the heir of a testator, shall be deemed to be estates coming to such settlor or heir under or by virtue of the settlement.

In determining what are settled estates within the meaning of this Act, the Court shall be governed by the state of facts, and by the trusts or limitations of the settlement at the time of the said settlement taking effect.<sup>5</sup>

This section is amended by s. 41 of the C. A., 1881 (c), which is as follows :—

[41. Where a person in his own right seised of or entitled to land for an estate in fee simple, or for any leasehold interest at a rent, is an infant, the land shall be deemed to be a settled estate within the Settled Estates Act, 1877.<sup>6</sup>]

44 & 45  
Vict. c. 41,  
§ 41.

<sup>1</sup> The first two paragraphs of this section are copied from, and correspond with, s. 1 of the Act of 1856, the third paragraph is a re-enact-

40 & 41 Vict. c. 18, ment of the material part of s. 1 of the Act of 1858, and the fourth is a similar re-enactment of s. 3 of the Act of 1864.

## § 2.

Compare the interpretation clause of the S. L. A., 1882 (*d*).

<sup>2</sup> The word "settlement" of course includes a sub-settlement of a share under a settlement (*e*).

What constitutes a "settled estate."

<sup>3</sup> Where real estate was devised to trustees upon trust for sale at their discretion, and investment of the proceeds and payment of the income to one or more persons (successively) for life with remainder over, such estate has been held to be "settled" (*f*). And where real estate was devised upon trust for testator's widow for life, and for sale and distribution at her death, an order for sale has been made during the life of the widow (*g*). Real estate devised upon trust for A. for her separate use on attaining twenty-one or marriage, with remainders over in default, was held to be "settled" (*h*). And a similar decision was arrived at where real estate was limited to the use of trustees upon trust for a married woman during the joint lives of herself and her husband, and after her death for such persons as she should (by will if she died during his life, and by deed or will if she survived him) appoint, and in default in trust for her heirs. In this case a petition was presented during the joint lives of the husband and wife (*i*). Trusts to let and manage during the life of A. and the minority of her children, and to pay one moiety of the income to A. during her life, and subject thereto for the children in equal shares, were held to constitute a settled estate; and an order for sale was made on the petition of A., the trustees, and the children (*j*).

So where real estate was devised upon trust for sale with the consent of testator's widow, and subject thereto and to an annuity to her, upon trust for testator's four children at twenty-one or marriage, with benefit of survivorship, an order for sale was made after the death of the widow (*k*). Accruing shares under a settlement constitute a succession, so as to render an estate settled (*l*).

Where some shares are absolutely vested and others are under settlement, the whole estate is considered "settled" (*m*). And where the Court was satisfied that the whole fee simple was vested in one or both of two persons who were petitioners, an order for sale was made (*n*).

Copyholds. <sup>4</sup> Copyholds have been ordered to be enfranchised and sold as free-

(*d*) 45 & 46 Vict. c. 38, p. 472, *post*.

(*e*) *Re Lendy*, 4 Ch. D. 879.

(*f*) *Re Laing*, L. R. 1 Eq. 416; *Re Chamberlain*, 23 W. R. 852; *Re Greene* 10 Jur. N. S. 78.

(*g*) *Re Morgan*, L. R. 9 Eq. 587; *Carlyon v. Truscott*, L. R. 20 Eq. 349—352.

(*h*) *Re Horn*, 29 L. T. N. S. 830.

(*i*) *Beioley v. Carter*, L. R. 4 Ch. 230—237.

(*j*) *Re Shephard*, L. R. 8 Eq. 571.

(*k*) *Collett v. Collett*, L. R. 2 Eq. 203.

(*l*) *Re Goodwin*, 3 Giff. 620.

(*m*) *Ibid*.

(*n*) *Re Williams*, 20 W. R. 967.

hold, the cost of enfranchisement being paid out of the proceeds of sale (o). 40 & 41  
Vict. c. 18,  
§ 2.

<sup>5</sup> That is, as distinguished from the state of things when an application is made to the Court. See the corresponding section of the Act of 1864 (p), and remarks of STUART, V.-C., in *Re Goodwin* (q). Time of  
settlement  
taking  
effect  
governs  
questions  
whether  
estates are  
"settled."

Land devised to the testator's brother upon trust for the first son of the brother who should attain twenty-one in fee with gifts over to the brother's daughters in default of such sons, and an ultimate gift to the brother in fee in default of children attaining twenty-one was held to be a settled estate, and a sale was ordered on the petition of the brother's four infant children (r).

<sup>6</sup> Before 1864 it was held that where a prior particular estate had determined, and the estate had become vested in fee simple in possession, in several persons it had ceased to be "settled," and the Court had no jurisdiction to order a sale under the Act of 1856, although some of the persons entitled might be infants (s). A lease could, under such circumstances, be authorised under 1 Wm. IV. c. 65, s. 17, if all parties interested were before the Court (t).

Section 17 of 1 Wm. IV. c. 65, is as follows:—

[Where any person being an infant under the age of twenty-one years is or shall be seised or possessed of or entitled to any land in fee or in tail, or to any leasehold land for an absolute interest, and it shall appear to the Court of Chancery to be for the benefit of such person that a lease or underlease should be made of such estates for terms of years for encouraging the erection of buildings thereon, or for repairing buildings actually being thereon, or the working of mines, or otherwise improving the same, or for farming or other purposes, it shall be lawful for such infant or his guardian, in the name of such infant, by the direction of the Court of Chancery to be signified by an order to be made in a summary way upon the petition of such infant or his guardian, to make such lease of the land of such persons respectively, or any part thereof, according to his or her interest therein respectively, and to the nature of the tenure of such estates respectively, for such term or terms of years, and subject to such rents and covenants as the said Court of Chancery shall direct.]

1 Wm. IV.  
c. 65,  
§ 17.

As to  
leases of  
infants'  
estates.

(o) *Re Adair*, L. R. 16 Eq. 124.

(p) 27 & 28 Vict. c. 45, s. 8.

(q) 3 Giff. 620—628.

(r) *Liddell v. Liddell*, 31 W. R. 239.

(s) *Re Bardin*, 7 W. R. 711; 5 Jur. N. S. 1378; *Re Birtle*, 11 W. R. 739.

(t) *Re Clark*, L. R. 1 Ch. 292.



## MEANING OF "THE COURT."

40 & 41  
Vict. c. 18,  
§ 3.

Interpre-  
tation of  
"the  
Court."

**3.** The expression "the Court" in this Act shall, so far as relates to estates in England, mean the High Court of Justice, and all causes and matters in respect of such estates commenced or continued under this Act shall, subject to the provisions of the Judicature Acts, be assigned to the Chancery Division of the High Court of Justice in like manner as if such causes and matters had arisen under an Act of Parliament by which, prior to the passing of the Judicature Acts, exclusive jurisdiction in respect to such causes and matters had been given to the Court of Chancery, or to any judges or judge thereof respectively.<sup>1</sup>

The expression "the Court" in this Act shall, so far as relates to estates in Ireland, mean the Court of Chancery in Ireland.<sup>2</sup>

<sup>1</sup> This section was not in any of the previous Settled Estates Acts. It has the effect of shortening several subsequent sections by the omission of words describing the Courts in England and Ireland respectively.

<sup>2</sup> Now the Chancery Division of the High Court of Justice in Ireland (u).

## COURT MAY AUTHORISE LEASES.

40 & 41  
Vict. c. 18,  
§ 4.

Power to  
authorise  
leases of  
settled  
estates.

**4.** It shall be lawful for the Court, if it shall deem it proper and consistent, with a due regard for the interests of all parties entitled under the settlement, and subject to the provisions and restrictions in this Act contained, to authorise leases of any settled estates, or of any rights or privileges over or affecting any settled estates, for any purpose whatsoever, whether involving waste or not, provided the following conditions be observed:<sup>1</sup>

Condition  
I.  
—  
Terms for  
which

First.<sup>2</sup> Every such lease shall be made to take effect in possession<sup>3</sup> at or within one year next after the making thereof, and shall be for a term of years not

(u) 40 & 41 Vict. c. 57, ss. 21 and 36.

exceeding for an agricultural or occupation lease, so far as relates to estates in England, twenty-one years, or so far as relates to estates in Ireland, thirty-five years,<sup>4</sup> and for a mining lease<sup>5</sup> or a lease of water mills, way leaves, water leaves, or other rights or easements forty years, and for a repairing lease sixty years, and for a building lease ninety-nine years: Provided always, that any such lease (except an agricultural lease) may be for such term of years as the Court shall direct, where the Court shall be satisfied that it is the usual custom of the district and beneficial to the inheritance to grant such a lease for a longer term<sup>6</sup> than the term hereinbefore specified in that behalf:

40 & 41  
Vict. c. 18,  
§ 4.

leases may  
be autho-  
rised.

Secondly.<sup>7</sup> On every such lease shall be reserved the best rent<sup>8</sup> or reservation in the nature of rent, either uniform or not, that can be reasonably obtained, to be made payable half-yearly or oftener without taking any fine or other benefit in the nature of a fine: Provided always, that in the case of a mining lease, a repairing lease, or a building lease a peppercorn rent<sup>9</sup> or any smaller rent than the rent to be ultimately made payable may, if the Court shall think fit so to direct, be made payable during all or any part of the first five years of the term of the lease:

Condition  
II.

Best rent  
to be  
reserved.

Thirdly.<sup>10</sup> Where the lease is of any earth, coal, stone, or mineral, a certain portion of the whole rent or payment reserved shall be from time to time set aside and invested as hereinafter mentioned,<sup>11</sup> namely, when and so long as the person for the time being entitled to the receipt of such rent is a person who by reason of his estate or by virtue of any declaration in the settlement is entitled to work such earth, coal, stone, or mineral for his own benefit, one-fourth part of such rent and otherwise three-fourth parts thereof; and in every such lease sufficient provision

Condition  
III.

Invest-  
ment of  
part of  
rent of  
mineral  
leases.

40 & 41  
Vict. c. 18,  
§ 4.

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Condition  
IV.

—  
Timber  
not to be  
felled.

Condition  
V.

—  
Leases to  
be by  
deed with  
power of  
re-entry.

shall be made to ensure such application of the aforesaid portion of the rent by the appointment of trustees or otherwise as the Court shall deem expedient:

Fourthly.<sup>10</sup> No such lease shall authorise the felling of any trees except so far as shall be necessary for the purpose of clearing the ground for any buildings, excavations, or other works authorised by the lease:

Fifthly. Every such lease shall be by deed, and the lessee shall execute a counterpart thereof, and every such lease shall contain a condition for re-entry on non-payment of the rent for a period of twenty-eight days<sup>12</sup> after it becomes due, or for some less period to be specified in that behalf.

<sup>1</sup> The first paragraph of this section is a re-enactment of the corresponding part of s. 2 of the Act of 1856, with the omission of words defining "the Court."

An application for an order authorising a lease must be made by petition (*v*). As to the mode in which leases may be authorised, see s. 10, *post*.

See also the powers of leasing conferred on tenants for life by s. 46 of the S. E. A. (*x*), and by ss. 6 to 14 of the S. L. A., 1882 (*y*).

<sup>2</sup> This sub-section re-enacts in a consolidated form the provisions of the corresponding sub-section of s. 2 of the Act of 1856, and ss. 2 and 4 of the Act of 1858, with slight alterations.

Possession. <sup>3</sup> See *Re Ford* (*z*), cited under s. 7, *post*, p. 414.

Occupation leases in Ireland. <sup>4</sup> Under the Act of 1856 the time for which agricultural and occupation leases could be authorised was the same in Ireland as in England, viz., twenty-one years.

Mining lease. <sup>5</sup> Where a mining lease was authorised the order included "so much land as the trustees shall consider necessary for the convenient and effective working of the minerals" (*a*). For a special order authorising a mining lease for forty years, see *Re Boyd* (*b*).

<sup>6</sup> The trustees of a charity were authorised to grant building leases for 600 years (*c*). And an order authorising a building lease for a term

(*v*) Sect. 28, *post*.

(*x*) P. 448, *post*.

(*y*) P. 479, *post*.

(*z*) L. R. 8 Eq. 809.

(*a*) *Re Reveley*, 11 W. R. 744.

(*b*) I. R. 8 Eq. 76.

(*c*) *Re Cross*, 27 B. 592.

of 999 years at a fee farm rent was made, on evidence being given that such was the invariable custom of the country, and that the property could not be advantageously disposed of for that purpose on any other terms (d). 40 & 41  
Vict. c. 18,  
§ 4.

<sup>7</sup> The first clause of this sub-section is a re-enactment of the corresponding sub-section in the Act of 1856.

<sup>8</sup> The “best rent” means the best terms which can reasonably be made for the benefit of the beneficiaries under the settlement. Therefore where an existing lease was surrendered (e) the value of the old lease was taken into account in fixing the rent under the new lease (f). Best rent.

<sup>9</sup> The latter part of this sub-section is new. Where a testator had entered into contracts for granting building leases with provisions for apportioning the ground rents among the houses in such a manner that some would be held at a peppercorn rent, it was doubted, in 1861, whether the Act of 1856 applied, and a private Act of Parliament was considered necessary to authorise the trustees of the will to carry out such contracts (g).

<sup>10</sup> Sub-ss. 3 and 4 are *verbatim* re-enactments of provisions in the Act of 1856.

<sup>11</sup> See ss. 34—36, *post*, pp. 437—441, as to investment.

<sup>12</sup> In the corresponding sub-section in the Act of 1856 this period was “not less than twenty-eight days.”

#### LEASES—SPECIAL COVENANTS.

**5.** Subject and in addition to the conditions hereinbefore mentioned, every such lease shall contain such covenants, conditions, and stipulations as the Court shall deem expedient with reference to the special circumstances of the demise.<sup>1</sup> 40 & 41  
Vict. c. 18,  
§ 5.  
  
Leases  
may con-  
tain special  
covenants.

<sup>1</sup> This is a *verbatim* re-enactment of s. 3 of the Act of 1856.

See Ord. 25 of the S. E. A. Orders, 1878, p. 464, *post*.

#### LEASES—PARTS OF ESTATES.

**6.** The power to authorise leases conferred by this Act shall extend to authorise leases either of the whole or any 40 & 41  
Vict. c. 18,  
§ 6.

(d) *Re Carr*, 9 W. R. 776.

(e) See sect. 7, *post*.

(f) *Re Rawlins*, L. R. 1 Eq. 286.

(g) *Cust v. Middleton*, 3 D. F. J. 33.

40 & 41 parts of the settled estates, and may be exercised from time  
 Vict. c. 18, to time.<sup>1</sup>  
**§ 6.**

Parts of  
 settled  
 estates  
 may be  
 leased.

<sup>1</sup> This is a *verbatim* re-enactment of s. 4 of the Act of 1856.

#### LEASES—SURRENDER.

40 & 41 **7.** Any leases, whether granted in pursuance of this Act  
 Vict. c. 18, or otherwise, may be surrendered either for the purpose of  
**§ 7.** obtaining a renewal of the same or not, and the power to  
 authorise leases conferred by this Act shall extend to authorise  
 new leases of the whole or any part of the hereditaments  
 comprised in any surrendered lease.<sup>1</sup>

Leases  
 may be  
 surren-  
 dered and  
 renewed.

<sup>1</sup> This section merely consolidates the provisions contained in s. 5 of the Act of 1856 and s. 5 of the Act of 1858.

Where an old lease is surrendered under this section and a new one granted, the latter takes effect in possession, although an existing underlease may not have been surrendered; and the term of the underlease continues as if the lease had not been surrendered (*h*). As to the effect of a surrender on the rent under a new lease, see *Re Rawlins*, cited under s. 4 (1), p. 413, *ante*.

#### LEASES—PRELIMINARY CONTRACTS.

40 & 41 **8.** The power to authorise leases conferred by this Act  
 Vict. c. 18, shall extend to authorise preliminary contracts to grant any  
**§ 8.** such leases, and any of the terms of such contracts may be  
 varied in the leases.<sup>1</sup>

Power to  
 authorise  
 leases to  
 extend to  
 prelimi-  
 nary  
 contracts.

<sup>1</sup> This is a *verbatim* re-enactment of s. 6 of the Act of 1856.

#### LEASES—SETTLED MANORS.

40 & 41 **9.** All the powers to authorise and to grant leases contained  
 Vict. c. 18, in this Act shall be deemed to include respectively powers to  
**§ 9.** authorise the lords of settled manors<sup>1</sup> and powers to the lords

Powers of

(*h*) *Re Ford*, L. R. 8 Eq. 309.

of settled manors to give licenses to their copyhold or customary tenants to grant leases of lands held by them of such manors to the same extent and for the same purposes as leases may be authorised or granted of freehold hereditaments under this Act.

40 & 41  
Vict. c. 18,  
**§ 9.**

leasing to include powers to lords of settled manors to give licences to their copyhold or customary tenants to grant leases.

<sup>1</sup> This section contains provisions similar to those of s. 3 of the Act of 1858, with the addition of a power to the Court "to authorise the lords of settled manors" to give licenses, which had probably been accidentally omitted in the earlier enactment.

#### LEASES—HOW AUTHORISED.

**10<sup>1</sup>.** The power to authorise leases conferred by this Act may be exercised by the Court either by approving of particular leases or by ordering that powers of leasing, in conformity with the provisions of this Act, shall be vested in trustees in manner hereinafter mentioned.<sup>2</sup>

40 & 41  
Vict. c. 18,  
**§ 10.**

Mode in which leases may be authorised.

<sup>1</sup> This is a *verbatim* re-enactment of s. 7 of the Act of 1856.

<sup>2</sup> See s. 13, *post*, p. 416.

See also, the additional power to authorise leases conferred by s. 10 of the S. L. A. 1882 (i).

#### LEASES—EVIDENCE ON APPLICATION.

**11.** When application is made to the Court either to approve of a particular lease or to vest any powers of leasing in trustees, the Court shall require the applicant to produce such evidence as it shall deem sufficient to enable it to ascertain the nature, value, and circumstances of the estate, and the terms and conditions on which leases thereof ought to be authorised.<sup>1</sup>

40 & 41  
Vict. c. 18,  
**§ 11.**

What evidence to be produced on an application to authorise leases.

<sup>1</sup> This is a *verbatim* re-enactment of s. 8 of the Act of 1856.

(i) P. 482, *post*.

## LEASES—COURT MAY APPOINT LESSOR.

40 & 41  
Vict. c. 18,  
§ 12.

After  
approval of  
a lease,  
Court to  
direct who  
shall be  
the lessor.

**12.** When a particular lease or contract for a lease has been approved by the Court, the Court shall direct what person or persons shall execute the same as lessor; and the lease or contract executed by such person or persons shall take effect in all respects as if he or they was or were at the time of the execution thereof absolutely entitled to the whole estate or interest which is bound by the settlement, and had immediately afterwards settled the same according to the settlement, and so as to operate (if necessary) by way of revocation and appointment of the use or otherwise, as the Court shall direct.<sup>1</sup>

<sup>1</sup> This is a *verbatim* re-enactment of s. 9 of the Act of 1856.

## LEASES—VESTING POWERS IN TRUSTEES.

40 & 41  
Vict. c. 18,  
§ 13.

Powers of  
leasing  
may be  
vested in  
trustees.

**13<sup>1</sup>.** Where the Court shall deem it expedient that any general powers of leasing any settled estates conformably to this Act should be vested in trustees,<sup>2</sup> it may by order vest any such power accordingly either in the existing trustees of the settlement or in any other persons, and such powers when exercised by such trustees, shall take effect in all respects as if the power so vested in them had been originally contained in the settlement, and so as to operate (if necessary) by way of revocation and appointment of the use or otherwise, as the Court shall direct; and in every such case the Court, if it shall think fit, may impose any conditions as to consents (*m*) or otherwise on the exercise of such power, and the Court may also authorise the insertion of provisions for the appointment of new trustees from time to time for the purpose of exercising such powers of leasing as aforesaid.

<sup>1</sup> This is a *verbatim* re-enactment of s. 10 of the Act of 1856, and the following cases under that section are therefore applicable to the present.

<sup>2</sup> On a petition by the assignee of a tenant for life, where some of the remaindermen were not *in esse*, the Court refused to vest general powers of leasing in the trustees, but authorised a particular lease (*l*). 40 & 41  
Vict. c. 18,  
§ 13.

General powers to grant mining leases have been vested in trustees under the corresponding section of the Act of 1856 (*m*). Also powers to grant building leases for 600 (*n*) and 999 years (*o*). But where a settlement contained powers of leasing with the consent of a specified person, the Court refused to vest in the trustees powers exercisable without such consent (*p*). General  
powers of  
leasing.

Where the Court had vested powers of leasing in trustees without imposing any condition as to consents, but the order, as passed and entered, contained words requiring the consent of the tenant for life, the order was amended on motion by striking out such words (*q*).

Where the Court had vested general powers of leasing in the trustees of two adjoining estates held upon separate trusts for distinct *cestuis que trustent*, such powers were held not to authorise a single mining lease of both properties at an entire rent. An agreement for such a lease was held to constitute a breach of trust, and an action to enforce specific performance of it was dismissed (*r*).

See *Cust v. Middleton*, cited under s. 4, p. 413, *ante*.

LEASES—SETTLEMENT BY COURT.

**14.**<sup>1</sup> Provided always, that in orders under this Act for vesting any powers of leasing in any trustees or other persons, no conditions shall be inserted requiring that the leases thereby authorised should be submitted to or be settled by the Court or a judge thereof,<sup>2</sup> or be made conformable with a model lease deposited in the judge's chambers,<sup>3</sup> save only in any case in which the parties applying for the order may desire to have any such condition inserted, or in which it shall appear to the Court that there is some special reason rendering the insertion of such a condition necessary or expedient. 40 & 41  
Vict. c. 18,  
§ 14.  
Conditions  
that leases  
be settled  
by the  
Court not  
to be  
inserted  
in orders  
made  
under this  
Act.

(*l*) *Re Hutchinson*, 12 Jur. N. S. 244.

(*m*) *Re Dorning*, 14 W. R. 125; *Tolson v. Sheard*, 5 Ch. D. 19.

(*n*) *Re Cross*, 27 B. 592.

(*o*) *Re Hoyle*, 12 W. R. 1124.

(*p*) *Re Hurle*, 2 H. & M. 196.

(*q*) *Re Riley*, 30 W. R. 78; R. S. C. 1883, Ord. XXVIII. r. 11.

(*r*) *Tolson v. Sheard*, 5 Ch. D. 19.



40 & 41  
Vict. c. 18,  
**§ 14.**

Settling  
leases in  
chambers.

<sup>1</sup> This is a re enactment of s. 1 of the Act of 1864, with merely verbal alterations to render it applicable to "this Act" instead of to s. 10 of the Act of 1856.

<sup>2</sup> When powers of leasing were vested in trustees prior to the Act of 1864, the usual course was to order all leases to be settled in chambers (s), but not necessarily by conveyancing counsel (t).

<sup>3</sup> Where, however, building leases of plots for small houses were authorised, a model lease was deposited in chambers (u). And when the leases were of cottages on a large estate, for which a printed form of lease was used, settlement in chambers was dispensed with (x).

Since 1864 it has not been thought necessary to have even mining leases settled in chambers (y).

As to settling conveyances in chambers on a sale under this Act, see *Re Eyre* (z).

40 & 41  
Vict. c. 18,  
**§ 15.**

Conditions  
where  
inserted  
may be  
struck out.

**15.**<sup>1</sup> Provided also, that in all cases of orders (whether under this Act or under the corresponding enactment of the Acts hereby repealed)<sup>2</sup> in which any such condition as last aforesaid shall have been inserted, it shall be lawful for any party interested to apply to the Court to alter and amend such order by striking out such condition,<sup>3</sup> and the Court shall have full power to alter the same accordingly, and the order so altered shall have the same validity as if it had originally been made in its altered state; but nothing herein contained shall make it obligatory on the Court to act under this provision in any case in which from the evidence which was before it when the order sought to be altered was made, or from any other evidence, it shall appear to the Court that there is any special reason why in the case in question such a condition is necessary or expedient.

<sup>1</sup> This section corresponds with s. 2 of the Act of 1864, which applied only to orders made under s. 10 of the Act of 1856.

<sup>2</sup> This section, it will be observed, applies to orders under the previous Acts as well as under that of 1877.

<sup>3</sup> The power of striking out the condition requiring leases to be settled in chambers has been exercised in a case where an order was made before

(s) *Re Chambers*, 28 B. 653.  
(t) *Re Jones*, 5 Jur. N. S. 138; *Re Procter*, 3 Jur. N. S. 534.  
(u) *Re Hemingway*, 7 W. R. 279.  
Compare *A. G. v. Christchurch*, 3 Giff.

514.  
(x) *Re Earl of Jersey*, 9 W. R. 609.  
(y) *Re Dorning*, 14 W. R. 125.  
(z) 4 K. & J. 268.

the passing of the Act of 1864 (*a*), and also in a case where a petition was presented before, and an order made after, the passing of the last-mentioned Act (*b*).

40 & 41  
Vict. c. 18,  
**§ 15.**

## COURT MAY AUTHORISE SALES.

**16.** It shall be lawful for the Court,<sup>1</sup> if it shall deem it proper and consistent with a due regard for the interests<sup>2</sup> of all parties entitled<sup>3</sup> under the settlement, and subject to the provisions and restrictions<sup>4</sup> in this Act contained, from time to time to authorise a sale<sup>5</sup> of the whole or any parts<sup>6</sup> of any settled estates,<sup>7</sup> or of any timber (not being ornamental timber) growing on any settled estates, and every such sale shall be conducted and confirmed in the same manner as by the rules and practice of the Court for the time being is or shall be required in the sale of lands sold under a decree of the Court.<sup>8</sup>

40 & 41  
Vict. c. 18,  
**§ 16.**

Court may  
authorise  
sales of  
settled  
estates and  
of timber.

<sup>1</sup> This section differs from s. 11 of the Act of 1856 only in omitting the definition of the word "Court," which is supplied by s. 3 (*c*).

<sup>2</sup> Even where all parties interested concurred, the Court refused, in 1866, to make an order for a sale by private contract without a reference to chambers to ascertain whether such sale was for the benefit of the persons interested (*d*). But now, where the evidence shows that a sale will be beneficial, the usual course is to make an order on the hearing of the petition.

<sup>3</sup> "Parties entitled" means persons beneficially entitled; and trustees can only consent to a sale on behalf of unborn children (*e*). And if a sale is proved to be beneficial it will be ordered, notwithstanding the opposition of a contingent remainderman (*f*).

<sup>4</sup> The Court cannot authorise a sale if the settlement contains an express declaration to the contrary (*g*); but the fact that the settlement contains a power of sale does not restrict the power of the Court (*h*).

<sup>5</sup> The Court will not usually confer general powers of sale, but will only authorise such particular sales as are proved to be beneficial (*i*). In one case, where a settlement contained general powers of sale on the

(*a*) *Re Hoyle*, 12 W. R. 1124.

(*b*) *Re Russell*, 22 W. R. 399.

(*c*) P. 410, *ante*.

(*d*) *Re Hilton*, 14 L. T. N. S. 129.

(*e*) *Grey v. Jenkins*, 26 B. 351—6.

(*f*) *Re Spurway*, 10 Ch. D. 230;  
*Camden v. Murray*, 27 Sol. J. 652.

(*g*) Sect. 38, *post*, p. 442.

(*h*) *Ibid.*; *Re Thompson*, Joh. 418-423.

(*i*) *Re Peacock*, 15 W. R. 100.

40 & 41  
Vict. c. 18,  
**§ 16.**

Settled  
estates.

death of the tenant for life, an order was made authorising sales generally by the trustees during his life (*k*).

<sup>6</sup> Minerals may be sold apart from the surface (*l*), and on such a sale a rent-charge may be reserved in respect of surface damage (*m*). See s. 19, p. 422, *post*.

<sup>7</sup> What the Court is authorised to sell is the interest comprised in the settlement; but if a particular estate is settled, and the trustees of the reversion have a power of sale, the fee simple in possession may be sold (*n*). And where a settled estate was intermingled with an adjoining estate, vested in trustees for sale, the two estates were ordered to be sold together (*o*).

<sup>8</sup> On the eve of the Long Vacation an order was made authorising a sale out of court, subject to a reserved price to be fixed in chambers, and the payment of the purchase-money into court (*p*).

It has since been held that the Court has no jurisdiction to order a sale out of court, as this section requires the Court to retain control over the proceedings (*q*).

In making an order for sale under the Partition Act, CHITTY, J., drew a distinction between cases where trustees had and had not a power of sale, and in the latter case, he declined to authorise a sale out of Court (*r*).

As to the effect of a sale under this section as to succession duty, see s. 22 and notes thereto, p. 424, *post*.

Having regard to the extensive power of sale conferred on tenants for life by s. 3 of the S. L. A., it is now seldom necessary to apply to the Court under this section. An order under this section prevents a tenant for life from selling under the S. L. A.; but proceedings under such an order may be stayed if a sufficient case is made out (*s*).

#### PROCEEDINGS FOR PROTECTION.

40 & 41  
Vict. c. 18,  
**§ 17.**

Proceed-  
ings for  
protection.

**17.<sup>1</sup>** *It shall be lawful for the Court, if it shall deem it proper and consistent with a due regard for the interests of all parties who are or may hereafter be entitled under the settlement, and subject to the provisions and restrictions in this Act contained, to sanction any action, defence, petition to Parliament, parliamentary opposition, or other proceedings appearing to the Court necessary for the protection of any settled estate, and to order that all or any part of the*

(*k*) *Re Andrews*, 26 W. R. 811.

(*l*) *Re Mallin*, 3 Giff. 126; *Re Law*, 7 Jur. N. S. 511.

(*m*) *Re Milward*, L. R. 6 Eq. 248.

(*n*) *Grey v. Jenkins*, 26 B. 351—6.

(*o*) *Re Spurway*, 10 Ch. D. 230.

(*p*) *Re Adams*, 9 Ch. D. 116.

(*q*) *Re Harvey*, 21 Ch. D. 123.

(*r*) *Strugnell v. Strugnell*, 28 S. J. 710.

(*s*) *Re Barrs-Haden*, 32 W. R. 194.

costs and expenses in relation thereto be raised and paid by means of a sale or mortgage of or charge upon all or any part of the settled estate, or be raised and paid out of the rents and profits of the settled estate, or out of any moneys or investments representing moneys liable to be laid out in the purchase of hereditaments to be settled in the same manner as the settled estate, or out of the income of such moneys or investments, or out of any accumulations of rents, profits, or income.

<sup>40 & 41</sup>  
Vict. c. 18,  
**§ 17.**

This section is repealed by the S. L. A. 1882 (t), s. 36 of which is as follows :—

[36. The Court may, if it thinks fit, approve of any action, defence, petition to Parliament, parliamentary opposition, or other proceeding, taken or proposed to be taken for protection of settled land, or of any action or proceeding taken or proposed to be taken for recovery of land being or alleged to be subject to a settlement, and may direct that any costs, charges, or expenses incurred or to be incurred in relation thereto, or any part thereof, be paid out of the property subject to the settlement.]

<sup>45 & 46</sup>  
Vict. c. 38,  
**§ 36.**

Proceed-  
ing for  
protection  
of settled  
land.

Under the repealed section it was held that the Court might authorise proceedings for the protection of a settled estate, and permit the costs incurred by the tenant for life in carrying on such proceedings to be raised by a sale, although the application for authority was not made until after the proceedings had been commenced (u), and that trustees might pay the costs of such proceedings if properly taken, although they might not have been previously sanctioned by the Court (x).

#### SALES—FEE FARM RENT.

**18.<sup>1</sup>** When any land is sold for building purposes it shall be lawful for the Court, if it shall see fit, to allow the whole or any part of the consideration to be a rent issuing out of such land, which may be secured and settled in such manner as the Court shall approve.

<sup>40 & 41</sup>  
Vict. c. 18,  
**§ 18.**

Considera-  
tion for  
land sold  
for build-  
ing may be  
a fee farm  
rent.

<sup>1</sup> This is a *verbatim* re-enactment of s. 12 of the Act of 1856.

(t) 45 & 46 Vict. c. 38.

(u) *Re De la Warr*, 16 Ch. D. 587.

(x) *Re Twyford Abbey*, 30 W. R. 268.

## SALES—RESERVATION OF MINERALS.

40 & 41  
Vict. c. 18,  
§ 19.

Minerals,  
&c., may be  
excepted  
from sales.

**19.**<sup>1</sup> On any sale of land any earth, coal, stone, or mineral may be excepted,<sup>2</sup> and any rights or privileges may be reserved, and the purchaser may be required to enter into any covenants or submit to any restrictions which the Court may deem advisable.

<sup>1</sup> This is a *verbatim* re-enactment of s. 13 of the Act of 1856.

<sup>2</sup> See note 6 to s. 16 (*u*).

## LAYING OUT ROADS, STREETS, ETC.

40 & 41  
Vict. c. 18,  
§ 20.

Court may  
authorise  
dedication  
of any  
part of  
settled  
estates for  
streets,  
roads, and  
other  
works.

**20.** It shall be lawful for the Court,<sup>1</sup> if it shall deem it proper and consistent with a due regard for the interests of all parties entitled under the settlement, and subject to the provisions and restrictions in this Act contained, from time to time to direct that any part of any settled estates be laid out<sup>2</sup> for streets, roads, paths, squares, gardens, or other open spaces, sewers, drains, or watercourses,<sup>3</sup> either to be dedicated to the public or not; and the Court may direct that the parts so laid out shall remain vested in the trustees of the settlement, or be conveyed to or vested in any other trustees upon such trusts for securing the continued appropriation thereof to the purposes aforesaid in all respects, and with such provisions for the appointment of new trustees when required, as by the Court shall be deemed advisable.

<sup>1</sup> This section corresponds with s. 14 of the Act of 1856, but omits the definition of the word "Court" which that section contained. See s. 3 (*x*).

<sup>2</sup> General powers may be vested in trustees under this section, and the plans of the land proposed to be laid out need not be submitted to the Court on each exercise of the power (*y*).

(*u*) *Ante*, p. 420.  
(*x*) *Ante*, p. 410.

(*y*) *Re Hargreaves*, 15 W. R. 54.

<sup>3</sup> The drainage of an agricultural estate is not laying out the land in sewers, drains, or watercourses within this section; and the Court, therefore, instead of sanctioning a scheme for such drainage will direct inquiries under 8 & 9 Vict. c. 56, s. 4 (z).

40 & 41  
Vict. c. 18,  
**§ 20**

Compare s. 16 of S. L. A. 1882 (a).

**21.** Where any part of any settled estates is directed to be laid out for such purposes as aforesaid,<sup>1</sup> the Court may direct that any such streets, roads, paths, squares, gardens or other open spaces, sewers, drains, or watercourses, including all necessary or proper fences, pavings, connections and other works incidental thereto respectively, be made and executed, and that all or any part of the expenses in relation to such laying out and making and execution be raised and paid by means of a sale or mortgage of or charge upon all or any part of the settled estates, or be raised and paid out of the rents and profits of the settled estates or any part thereof,<sup>2</sup> or out of any moneys or investments representing moneys liable to be laid out in the purchase of hereditaments to be settled in the same manner as the settled estates,<sup>3</sup> or out of the income of such moneys or investments, or out of any accumulations of rents, profits or income; and the Court may also give such directions as it may deem advisable for any repair or maintenance of any such streets, roads, paths, squares, gardens, or other open spaces, sewers, drains, or watercourses, or other works, out of any such rents, profits, income, or accumulations during such period or periods of time as to the Court shall seem advisable.<sup>4</sup>

40 & 41  
Vict. c. 18,  
**§ 21.**

As to lay-  
ing out  
and mak-  
ing and  
executing  
and main-  
taining  
streets,  
roads, and  
other  
works, and  
expenses  
thereof.

<sup>1</sup> This section is founded on s. 1 of the Act of 1876. The words "for such purposes as aforesaid" are substituted for a repetition of the particular works which may be authorised.

<sup>2</sup> The words "or be raised and paid out of the rents and profits of the settled estates or any part thereof" are new.

<sup>3</sup> From this point to the end, the section is new.

<sup>4</sup> Prior to 1876 it had been held that notwithstanding the authority

(z) *Re Poynder, Dixon Poynder v. Cook*, 30 W. R. 7.

(a) P. 486, *post*.

40 & 41  
Vict. c. 18,  
**§ 21.**

to direct the laying out of land for the works mentioned in s. 14 of the Act of 1856 (see s. 20, *ante*) the Court had no power to order such works to be carried out (*b*), or to direct the costs of such works to be raised by a sale of a portion of the estate (*c*). But in one case leases which stipulated that the lessees should make roads were authorised (*d*).

### SALES—CONVEYANCE.

40 & 41  
Vict. c. 18,  
**§ 22.**

How sales  
and dedi-  
cations  
are to be  
effected  
under the  
direction  
of the  
Court.

**22.**<sup>1</sup> On every sale or dedication to be effected as herein-  
before mentioned the Court may direct what person or per-  
sons shall execute the deed of conveyance; and the deed  
executed by such person or persons shall take effect as if the  
settlement had contained a power enabling such person or  
persons to effect such sale or dedication, and so as to operate  
(if necessary) by way of revocation and appointment of the  
use or otherwise, as the Court shall direct.<sup>2</sup>

<sup>1</sup> This is a *verbatim* re-enactment of the provisions contained in s. 15 of the Act of 1856. Compare s. 40 and notes thereto, p. 443, *post*.

The result of a sale under this section is the same as if the uses of the settlement had been revoked by virtue of a power in the settlement; and the purchaser takes the land free from succession duty, which is charged on the purchase money (*e*).

<sup>2</sup> An order for sale was made, and certain trustees were directed to convey, which they did. The legal estate was then outstanding in a mortgagee, and was subsequently re-conveyed to other trustees. Wood, V.-C., held that the legal estate was bound by the order for sale and passed to the purchaser, who was not entitled to any further assurance (*f*).

Where one of two trustees, who had been ordered to convey, died before completion, BACON, V.-C., directed a petition for the appointment of a new trustee to be presented (*g*).

The conveyance must be settled by the judge, whether the parties differ or not; but when a large estate is sold in lots a model conveyance may be adopted (*h*).

(*b*) *Re Venour*, 2 Ch. D. 522.

(*c*) *Ibid.*; *Re Hurle*, 2 H. & N. 196—203.

(*d*) *Re Chambers*, 28 B. 653.

(*e*) *Re Warner*, 17 Ch. D. 711; 16

& 17 Vict. c. 51, § 42.

(*f*) *Eyre v. Saunders*, 5 Jur. N. S. 703.

(*g*) *Scott v. Heisch*, 24 W. R. 108.

(*h*) *Re Eyre*, 2 K. & J. 268.

## WHO MAY PETITION.

**23.**<sup>1</sup> Any person entitled to the possession or to the receipt<sup>2</sup> of the rents and profits of any settled estates for a term of years determinable on his death, or for an estate for life,<sup>3</sup> or any greater estate, and also any person entitled to the possession or to the receipt of the rents and profits of any settled estates as the assignee of any person who but for such assignment would be entitled to such estates for a term of years determinable with any life, or for an estate for any life, or any greater estate, may apply to the Court by petition<sup>4</sup> in a summary way to exercise the powers conferred by this Act.

40 & 41  
Vict. c. 18,  
**§ 23.**

Applica-  
tion by  
petition to  
exercise  
powers  
conferred  
by this  
Act.

<sup>1</sup> This is a re-enactment, with considerable amendments, of s. 16 of the Act of 1856. By that section the right to petition was limited to "any person entitled to the receipt," &c., "for a term of years determinable on his death, or for an estate for life, or any greater estate." Now it is extended to the assignee of a tenant either for life or *pur autre vie*, or any greater estate. Singularly enough it does not apply, as does s. 46, *post*, to a tenant "for any life," so as to include the case of a tenant *pur autre vie*, who is not an assignee.

<sup>2</sup> A testator gave his own and his late father's residuary estate to trustees upon trusts, under which, as to two-fifths, the income was payable to his widow for life; and as to the other three-fifths, the income was to be applied in payment of the ground rents, taxes, insurance and other expenses of management in respect of the entirety, and the nett residue of such income was also to be paid to his widow for life. The trustees had large powers of management, but there was no power to grant leases. It was held by JESSEL, M. R., that the widow did not come within the definition of a person entitled to petition contained in s. 16 of the Act of 1856; and this decision was affirmed on appeal (i). The case had previously been before the learned judge on another point (k); and there are some observations in his judgment which seem to imply a doubt whether an equitable tenant for life could, in any case, petition. The following remarks were, however, made by JAMES, L. J.: "The Master of the Rolls has not decided anything on the general construction of the Act, but he has decided that, having regard to the very peculiar construction of this will and to the peculiar mode in which

(i) *Taylor v. Taylor*, 1 Ch. D. 426; (k) L. R. 20 Eq. 297—303-4.  
3 Ch. D. 145.



40 & 41  
Vict. c. 18,  
**§ 23.** the rent and profits of part of the property are to be applied in repairing the whole, it is in this case impossible to authorise leases." It should also be observed that the petition was opposed by a remainderman whose concurrence was held, in both Courts, to be necessary.

Who may  
petition.

The provision in s. 46, allowing a person entitled to the receipt of rents "for any life" to grant leases, may possibly be construed to imply that where there is an equitable tenant for life the trustees can exercise the power. But s. 23 does not contain similar words applicable to cases where a petition is necessary. As to petitions by infants, lunatics, and persons of unsound mind, see p. 451, *et seq.*, *post*.

<sup>3</sup> In one case under the Act of 1856, an order was made on the petition of the assignee of a tenant for life, although such a person did not come strictly within the definition in that Act (*l*). And under this section an order was made on the petition of trustees who were entitled to receive the rents during the life of an annuitant; the trusts of the income being to pay the annuity and invest the surplus in the purchase of land. "I think it is quite clear that a person who is only entitled to receive during the life of another is a person who can apply under the 23rd section." *Per* CHITTY, J. (*m*).

In 1868 a petition was presented by a tenant for life, subject to a term; and leave to amend by making the trustees of the term co-petitioners was given and an order made (*n*).

An order was made in 1861, on the petition of a widow and her children, where the property was limited to the widow during widowhood with remainder to the children (*o*). And generally, where all persons interested in the property are before the Court and consent, an order will be made (*p*).

Applica-  
tion by  
petition.

<sup>4</sup> *Semble* that an order can only be made on petition (*q*). No other process can be adopted. *Per* JESSEL, M. R. (*r*). Compare the observations of FRY, J. and HALL, V.-C., in cases (*s*) under the Trustee Relief Act.

Every petition must set forth the name, address and description of the petitioner, and also an address for service within two miles from the Record and Writ Clerks' Office (*t*). But see, now, R. S. C. 1883, Ord. 4, r. 1.

Title of  
petition,  
&c.

All petitions, notices, affidavits and other proceedings must also be entitled in the matter of the Act and of the property, mentioning the county and parish or place where it is situated, and describing it in

(*l*) *Re Hutchinson*, 14 W. R. 473.

(*m*) *Vine v. Raleigh*, 24 Ch. D. 240.

(*n*) *Ex p. Puxley*, 1 R. 2 Eq. 237.

(*o*) *Williams v. Williams*, 9 W. R. 888.

(*p*) *Re Williams*, 20 W. R. 967;  
*Re Harris*, 28 W. R. 721.

(*q*) *Harvey v. Clark*, 25 B. 7.

(*r*) *Taylor v. Taylor*, 1 Ch. D. 426, 431.

(*s*) *Pelling v. Goddard*, 26 W. R. 476; *Re Puttrel's Trusts*, 7 Ch. D. 647.

(*t*) S. E. A. Orders, 1878. Ord. 31.

general terms. Every petition must also be marked with the name of the judge before whom it is to be heard (*u*). The name of the judge is now marked by the registrar at the Central Office (*x*). The property need only be described in such a way as to make the matter intelligible to the Court (*y*). 40 & 41  
Vict. c. 18,  
**§ 23.**  
Evidence  
in support.

Every petition for a sale must be supported by evidence as to the persons interested whose consent is necessary, and the circumstances which render the sale expedient (*z*).

As to the practice on petitions, see the S. E. A. Orders, 1878 (*a*).

CONSENTS TO APPLICATIONS.

**24.** Subject to the exceptions hereinafter<sup>1</sup> contained, every application<sup>2</sup> to the Court must<sup>3</sup> be made with the concurrence or consent of the following parties,<sup>4</sup> namely, 40 & 41  
Vict. c. 18,  
**§ 24.**

Where there is a tenant-in-tail under the settlement in existence and of full age, then the parties to concur or consent shall be such tenant-in-tail, or if there is more than one such tenant-in-tail, then the first of such tenants-in-tail and all persons in existence having any beneficial estate or interest under or by virtue of the settlement prior to the estate of such tenant-in-tail, and all trustees having any estate or interest on behalf of any unborn child prior to the estate of such tenant-in-tail; With  
whose  
consent  
such  
applica-  
tion to be  
made.

And in every other case the parties to concur or consent shall be all the persons in existence having any beneficial estate or interest under or by virtue of the settlement, and also all trustees having any estate or interest on behalf of any unborn child.

<sup>1</sup> This section is a re-enactment of the provisions of s. 17 of the Act of 1856, with the substitution of the word "hereinafter" for "in the next section."

<sup>2</sup> This section does not apply to applications under s. 37 (*b*).

(*u*) *Ibid.* Ord. 2.

(*x*) R. S. C. 1883. Ord. V. r. 8 (*d*).

(*y*) *Re Burnley*, 23 W. R. 546; *Re Thompson*, Joh. 418.

(*z*) S. E. A. Orders, 1878. Ord. 15.

(*a*) P. 459, *post*.

(*b*) *Re Cleveland*, 2 Dr. & S. 481.

40 & 41  
Vict. c. 18,  
**§ 24.**

<sup>3</sup> In 1867 it was held that the Court had no discretion to make an order if any person whose consent was necessary opposed it (*c*). And where a testator by his will made the consent of his widow necessary the Court, in 1864, refused to make an order on a petition opposed by her (*d*).

<sup>4</sup> But the Court now has much larger powers of dispensing with consents than formerly. The following is a summary of the existing provisions on the subject:—

Summary  
of provi-  
sions as to  
consents.

Subject to the exceptions mentioned below, all persons in existence, and all trustees for unborn persons, having any beneficial interest must consent (*e*). But if there is a tenant-in-tail in existence, no persons having interests subsequent to him need concur if he is *sui juris* (*f*), and the Court may, in its absolute discretion, dispense with the consent of such persons if the tenant-in-tail is an infant (*g*).

In any other case the Court may dispense with the consent of any person, having regard to the number and interests of the persons assenting and dissenting respectively (*h*).

Or an order may be made without the consent, but subject to the rights of any person whose consent the Court does not think fit to dispense with (*i*). This provision did not, formerly, apply, as it now does, to a person entitled to an estate of inheritance.

Where the Court does not, in the first instance, think fit to dispense with the consent of any person, it may direct him to be served with a notice requiring him to state, within a specified time, whether he consents, dissents, or submits his interests to the Court; and if he omits to do so, he is to be deemed to have submitted (*k*).

The Court may, however, dispense with the service of such a notice in the following cases:—

- (*a*) If the person cannot be found.
- (*β*) If it is uncertain whether he is living or dead.
- (*γ*) If the expense of service would be disproportionate to the value of the property.

The person on whom service is so dispensed with, is to be deemed to have submitted his interests to the Court (*l*).

See also the last sentence of s. 30 (p. 433) as to service which gives the Court an implied power to dispense with service when it thinks fit.

In 1866 an order authorising a lease was made, notwithstanding the opposition of tenants for life in remainder (*m*). And in other early

- (*c*) *Re Merry*, 15 W. R. 807.
- (*d*) *Re Hurle*, 2 H. & M. 196.
- (*e*) Sect. 24.
- (*f*) Sect. 24.
- (*g*) Sect. 25.

- (*h*) Sect. 28.
- (*i*) Sect. 29.
- (*k*) Sect. 26.
- (*l*) Sect. 27.
- (*m*) *Re Hutchinson*, 14 W. R. 473.

cases service on persons of unsound mind not so found (n), who had small interests, was dispensed with; and it was decided that trustees who had power to give receipts could concur on behalf of their *cestuis que trustent*, who were beneficially interested in the purchase money (o). 40 & 41  
Vict. c. 18,  
§ 24.

But these decisions were subsequently overruled; and it was even held that the consent of persons beneficially interested in a term for raising portions was necessary (p). And in another case, where real estate was devised to A., B., and C. successively for life, and after the death of the survivor to X., upon trust to sell and divide the proceeds among twenty-five persons, it was held that the consent of all the persons beneficially interested in the proceeds was necessary, as a trustee can only consent on behalf of unborn persons (q). So where a testator gave real estate upon trust for his daughter A. for life, with remainder to her children, as she should appoint, and in default upon trusts for the survivor of his daughters, B. and C., it was held on a petition by A. that the trustees of the will could not consent on behalf of the infant children of C., who had married and settled her share (r). But where real estate was given to trustees upon trust for A. for life, with remainder as she should appoint, and in default in trust for such person as she should leave her heir, an objection that the Court had no jurisdiction on a petition by A. to make an order binding on the heir of A. was overruled, on the ground that he could not be ascertained during her life. In that case SELWYN, L. J., remarked—"A person whose consent is to be obtained must be one whose consent is capable of being obtained, not one who is not in existence (s)."

So also where real estate was given to trustees, subject to the life estates of A. and her husband, upon trust to sell and hold the proceeds upon trust for all the children of A. who should be living at the death of the survivor of the testator, and A. and her husband, and the issue of such as should be then dead, it was held, on the petition of A., her husband, and five of their children, that the consent of the infant children of the other child (who consented) was not necessary, as they belonged to a class the members of which could not then be ascertained (t).

Where a contingent remainderman refused to consent an order for sale was made, notwithstanding his opposition (u).

The order ought to state the names of all persons interested, who

(n) *Re Turbutt*, 2 N. R. 158; *Re Franklin*, 7 W. R. 45.

(o) *Eyre v. Saunders*, 4 Jur. N. S. 830; *Re Potts*, L. R. 16 Eq. 631 n. Compare *Grey v. Jenkins*, 26 B. 351.

(p) *Re Boughton*, 12 W. R. 34.

(q) *Re Ives*, 3 Ch. D. 690.

(r) *Re Dendy*, 4 Ch. D. 879.

(s) *Beioley v. Carter*, L. R. 4 Ch. 230—238.

(t) *Re Strutt*, L. R. 16 Eq. 629. Compare *Re Chamberlain*, 23 W. R. 825.

(u) *Re Spurway*, 10 Ch. D. 230.

40 & 41  
Vict. c. 18,  
**§ 24.** concur, who are heard on the application, and also of persons, notice to whom has been dispensed with (x). But when this is not done, the purchaser, nevertheless, has a good title under s. 70 of the C. A. 1881 (y).

See also cases cited under ss. 26, 28, and 29, *post*.

40 & 41  
Vict. c. 18,  
**§ 25.**

Court may  
dispense  
with con-  
sent in re-  
spect of  
certain  
estates.

**25.**<sup>1</sup> Provided always, that where an infant is tenant-in-tail under the settlement, it shall be lawful for the Court, if it shall think fit, to dispense with the concurrence or consent of the person, if only one, or all or any of the persons, if more than one, entitled, whether beneficially or otherwise, to any estate or interest subsequent to the estate tail of such infant.

<sup>1</sup> This section is new. It has been acted upon where an infant of eleven years of age was tenant in tail in possession (z). See note 2 to s. 24, *ante*.

40 & 41  
Vict. c. 18,  
**§ 26.**

Notice to  
be given to  
persons  
who do  
not con-  
sent to or  
concur in  
the appli-  
cation.

**26.**<sup>1</sup> Provided always, that where on an application under this Act the concurrence or consent of any such person as aforesaid shall not have been obtained, notice shall be given<sup>2</sup> to such person in such manner<sup>3</sup> as the Court to which the application shall be made shall direct, requiring him to notify, within a time to be specified in such notice,<sup>4</sup> whether he assents to or dissents from such application, or submits his rights or interests so far as they may be affected by such application to be dealt with by the Court, and every such notice shall specify to whom and in what manner such notification is to be delivered or left. In case no notification shall be delivered or left in accordance with the notice, and within the time thereby limited, the person to or for whom such notice shall have been given or left shall be deemed to have submitted his rights and interests to be dealt with by the Court.<sup>4</sup>

<sup>1</sup> This is a re-enactment of the provisions of s. 2 of the Act of 1874, with slight verbal alterations to adapt them to the consolidated Act.

<sup>2</sup> Notice has been ordered to be given to remaindermen who were *sui juris* (a), to persons of unsound mind not so found, and the persons who had charge of them (b), and to a married woman residing in New Zealand,

(x) S. E. A. Orders, 1878. Ord. 24. 652.

(y) *Re Hall Dare*, 21 Ch. D. 41.

(z) *Camden v. Murray*, 27 Sol. J.

(a) *Re Chamberlain*, 23 W. R. 852.

(b) *Re Crabtree*, L. R. 10 Ch. 201.

whose interest was very small (c). And where a married woman, who was entitled to real estate contingently on surviving her two sisters, settled her share on trusts for the benefit of herself and her husband for life with remainder to her children, notice of a petition by her was ordered to be served on the children (d).

40 & 41  
Vict. c. 18,  
**§ 26.**

<sup>3</sup> In the last case the notice was given by serving the petition on the father of the infants (e). In another case notice to a person residing in New Zealand was sent by registered letter (f).

The time is now regulated by S. E. A. Orders, 1878, Order 4, and is as follows :—

(a) In the case of a guardian of an infant, such time as they shall direct. In an early case ten days was the time directed (g).

(β) In the case of a married woman, or a committee of a lunatic, not less than twenty-eight days.

(γ) In other cases not less than fourteen days.

Leave to serve the notice out of the jurisdiction may be obtained *ex parte* at chambers (h).

Persons served may peruse the petition without payment, and may obtain copies under R. S. C. 1875, Order 5 (i).

<sup>4</sup> As to the application of this provision to infants and lunatics, see S. E. A., Ord. 7 (j).

**27.<sup>1</sup>** Provided also, that where on an application under this Act the concurrence or consent of any such person as aforesaid shall not have been obtained, and in case such person cannot be found, or in case it shall be uncertain whether he be living or dead, or in case it shall appear to the Court that such notice as aforesaid cannot be given to such person without expense disproportionate to the value of the subject matter of the application, then and in any such case the Court, if it shall think fit, either on the ground of the rights or interests of such person being small or remote, or being similar to the rights or interests of any other person or persons, or on any other ground, may by order dispense with notice to such person, and such person shall thereupon be deemed to have submitted his rights and interests to be dealt with by the Court.

40 & 41  
Vict. c. 18,  
**§ 27.**

Court may  
dispense  
with notice  
under  
certain  
circum-  
stances.

(c) *Re Rylar*, 24 W. R. 949. Com-  
pare *Re Mewburn*, 22 W. R. 752.

(d) *Re Dendy*, 4 Ch. D. 879.

(e) *Ibid.*

(f) *Re Rylar*, 24 W. R. 949.

(g) *Re Dendy*, 4 Ch. D. 879.

(h) S. E. A. Orders, 1878. Ord. 4.

(i) S. E. A. Orders, 1878. Ord. 22.

(j) P. 461, *post*.

40 & 41  
Vict. c. 18,  
**§ 27.**

<sup>1</sup> This section is new, and it was probably introduced in consequence of a decision to the effect that the consent of a married woman, whose interest was very small and who lived in New Zealand, could not be dispensed with under s. 3 of the Act of 1874 (s. 28 of the Act of 1877) unless she had been served with notice under the preceding section.

Compare the last sentence of s. 30, *post*, p. 433, and see cases cited thereunder. See also *Re Cundee*, W. N. (1877) 184 ; and *Re Hall Dare*, cited under s. 24 (*k*).

40 & 41  
Vict. c. 18,  
**§ 28.**

Court may  
dispense  
with con-  
sent, hav-  
ing regard  
to the  
number  
and in-  
terests of  
parties.

**28.**<sup>1</sup> An order may be made upon any application, notwithstanding that the concurrence or consent of any such person as aforesaid shall not have been obtained or shall have been refused, but the Court in considering the application shall have regard to the number of persons who concur in or consent to the application, and who dissent therefrom or who submit or are to be deemed to submit their rights or interests to be dealt with by the Court, and to the estates or interests which such persons respectively have or claim to have in the estate as to which such application is made<sup>2</sup>; and every order of the Court made upon such application shall have the same effect as if all such persons had been consenting parties thereto.

<sup>1</sup> This section is a re-enactment of the provisions of s. 3 of the Act of 1874, with a slight verbal alteration.

<sup>2</sup> Where a person aged sixty-one was entitled to the rents and profits, and the reversion in fee was limited (in the events which had happened) to the survivor of the tenant for life, and X., whose age was forty-eight, the Court refused, on a petition by the tenant for life, to make an order, which was opposed by X.; and this decision was affirmed on appeal (*l*).

Testator devised his real estate to trustees for sale. He was entitled in fee to one hundred and sixty-five acres absolutely, and to two hundred acres subject to a gift over to X. in the event of all his children dying without leaving lawful issue. He left four children, the eldest being twelve years old. A sale of the whole estate was ordered, notwithstanding the opposition of X. (*m*).

See *Re Rylar*, p. 431, cited under s. 26, *Re Hurle*, p. 428, and *Re Hall Dare*, p. 430, cited under s. 24, *ante*.

(*k*) P. 430, *ante*.

(*l*) *Taylor v. Taylor*, 1 Ch. D. 426,

3 Ch. D. 145.

(*m*) *Re Spurway*, 10 Ch. D. 230.

**29.**<sup>1</sup> Provided nevertheless, that it shall be lawful for the Court, if it shall think fit, to give effect to any petition subject to, and so as not to affect the rights, estate, or interest of, any person<sup>2</sup> whose concurrence or consent has been refused, or who has not submitted or is not deemed to have submitted his rights or interests to be dealt with by the Court,<sup>2</sup> or whose rights, estate, or interest ought in the opinion of the Court to be excepted.

40 & 41  
Vict. c. 18,  
**§ 29.**

Petition  
may be  
granted  
without  
consent,  
saving  
rights of  
non-con-  
senting  
parties.

<sup>1</sup> This is a re-enactment, with amendments, of s. 18 of the Act of 1856.

<sup>2</sup> The old section expressly excepted the case of a person entitled to an estate of inheritance whose consent was refused, or could not be obtained; and applied generally to the case of persons whose consent could not be obtained, instead of to those who have not submitted their interests to the Court.

Under s. 18 of the Act of 1856, orders were made subject to the rights of pecuniary legatees (*n*), especially where they were very numerous, and there was great difficulty in serving them all (*o*). Such cases would, probably, now be dealt with under s. 27 or s. 28.

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#### SERVICE OF PETITION.

**30.**<sup>1</sup> Notice of any application<sup>2</sup> to the Court under this Act shall be served on all trustees who are seised or possessed of any estate in trust for any person whose consent or concurrence to or in the application is hereby required, and on any other parties<sup>3</sup> who, in the opinion of the Court, ought to be so served,<sup>4</sup> unless the Court shall think fit to dispense with such notice.<sup>5</sup>

40 & 41  
Vict. c. 18,  
**§ 30.**

Notice of  
applica-  
tion to be  
served on  
all trus-  
tees, &c.

<sup>1</sup> This is a *verbatim* re-enactment of the provisions of s. 19 of the Act of 1856.

<sup>2</sup> Notice is given by serving a copy of the petition. Evidence that this has been done is required (*p*).

<sup>3</sup> *Semble* that the petition must be served on all persons in existence having any interest, down to the first tenant-in-tail (*q*). If, however,

(*n*) *Re Parry*, 34 B. 462.  
(*o*) *Re Legge*, 6 W. R. 20.

(*p*) S. E. A. Orders, 1878. Ord. 16.  
(*q*) *Re Bolton*, 19 W. R. 429.



40 & 41  
Vict. c. 18,  
**§ 30.**

Service of  
petition.

it is intended to ask the Court to dispense with the consent of any persons, under s. 28 or 29, such persons need not be served in the first instance; but the Court has power, under s. 26, to direct notice to be served on them. See also S. E. A. Ord. 1878, Ord. 18 (*q*).

<sup>4</sup> The petition must be served on such persons as the petitioner considers necessary, and must not be brought on merely to obtain the opinion of the Court as to service (*r*).

<sup>5</sup> In 1858, service of a petition on a married woman of unsound mind, not so found, who had only a remote contingent interest, was dispensed with. Other persons having similar interests had been served and consented to the application (*s*). Where infants had a remote contingent interest, the Court did not require them to be served (*t*).

See also sects. 27 and 28, pp. 431, 432, *ante*, and S. E. A. Ord. 1878, Ord. 22 (*u*).

#### ADVERTISEMENT OF PETITION.

40 & 41  
Vict. c. 18,  
**§ 31.**

Notice of  
applica-  
tion to be  
given in  
news-  
papers if  
Court  
direct.

**31.** Notice of any application to the Court under this Act shall, if the Court shall so direct, but not otherwise<sup>1</sup>, be inserted in such newspapers as the Court shall direct,<sup>2</sup> and any person or body corporate, whether interested in the estate or not, may apply to the Court by motion<sup>3</sup> for leave to be heard in opposition to or in support of any application which may be made to the Court under this Act; and the Court is hereby authorised to permit such person or corporation to appear and be heard in opposition to or support of any such application,<sup>4</sup> on such terms as to costs or otherwise, and in such manner, as it shall think fit.

<sup>1</sup> This is a re-enactment of s. 20 of the Act of 1856, with the important addition of the words, "*if the Court shall so direct, but not otherwise.*" Formerly the advertisement of a petition for a lease or sale was always necessary; but the rule did not apply to the case of an application for re-investment of purchase-money (*v*). In a case under the Act of 1877 (*x*), MALINS, V.-C., remarked that it would be a very extraordinary case which would induce him to require advertisements to be issued.

(*q*) P. 462, *post*.

(*r*) *Re Green*, 4 Jur. N. S. 530.

(*s*) *Re Franklin*, 7 W. R. 45. Compare *Re Turbutt*, 2 N. R. 158, and cases cited under s. 24, *ante*; and

*Re De Tabley*, 11 W. R. 936.

(*t*) *Re Chamberlain*, 23 W. R. 852.

(*u*) P. 463, *post*.

(*v*) *Re Sexton Barns*, 10 W. R. 416.

(*x*) *Re Chilcott*, W. N. (1877) 259.

In 1865 it was held that the description of the property in the advertisements must correspond verbally with that in the title of the petition, and the omission of the words "in the parish of" and "now unoccupied" was held fatal to the validity of the advertisement (*y*). But more recently it has been held that a slight discrepancy is merely an irregularity that the Court may waive (*z*).

40 & 41  
Vict. c. 18,  
§ 31.

Former  
practice as  
to adver-  
tisements.

Accordingly where a petition presented by twenty-six petitioners was advertised as presented by "X. and others" (*a*), where the address of the petitioner's solicitor, but not of the petitioner himself, was stated (*b*), where the address of the next friend of a petitioner was omitted (*c*), and where a testator was described as "of Gotham, in the county of Middlesex," instead of "Gotham in the county of Nottingham" (*d*), the advertisements were considered sufficient.

If it became necessary to amend a petition after the issue of the advertisements, it was not always necessary, under the Act of 1856, to repeat the advertisements. It would depend upon the circumstances of the case (*e*). Fresh advertisements were dispensed with in the following cases:—

Where a female respondent married and settled her share (*f*); where an infant who took an interest in the property was born (*g*); where a petitioner (tenant for life) died, and the tenant in tail became petitioner (*h*). And where general powers of leasing had been vested in a tenant for life, who died, an order was made on the petition of the new tenant for life vesting similar powers in trustees, without any advertisements (*i*).

So, where an order had been made on a petition under the Act of 1856, and a petition for a confirmation of the order was presented under the Act of 1877, in consequence of the title and advertisements of the former petition having omitted to describe a portion of the property, no further advertisements were required (*k*).

<sup>2</sup> An application for directions as to advertisements may be made *ex parte* by summons at chambers after the petition is presented. This was the practice under the Act of 1856 (*l*), but as advertisements are now rarely required, it is more usual to bring the petition on for hearing without making any such application, and then apply for the petition

Present  
practice as  
to adver-  
tisements.

(*y*) *Re Bateman*, 34 L. J. Ch. 320.  
(*z*) *Re Bicknell*, L. R. 14 Eq. 467.  
(*a*) *Re Whiteley*, L. R. 8 Eq. 574.  
(*b*) *Re Snell*, 19 W. R. 1000.  
(*c*) *Re Burley*, 18 L. T. N. S. 458.  
(*d*) *Re Hemaley*, L. R. 16 Eq. 315.  
Compare *Ex parte Webster*, 22 Ch. D. 136.  
(*e*) *Re Bunbury*, 11 Jur. N. S. 27.  
*Re Corbett*, 15 L. T. N. S. 173. *Re*

*Puzley*, I. R. 2 Eq. 237—245.  
(*f*) *Re Wilkinson*, 21 W. R. 537.  
*Re Marshall*, L. R. 15 Eq. 66.  
(*g*) *Re Lewis*, 24 W. R. 103. *Re*  
*Horton*, 34 B. 386.  
(*h*) *Re Willkinson*, L. R. 9 Eq. 71.  
(*i*) *Re Kentish Town*, 1 J. & H. 230.  
Compare *Wheeler v. Tootel*, 16 W. R. 273.  
(*k*) *Re Earl Kilmorey*, 26 W. R. 54.  
(*l*) Cons. Ord. XLI., r. 16.

40 & 41 to stand over, in the event of the Court considering advertisements  
 Vict. c. 18, necessary.

**§ 31.**

Advertise-  
 ment of  
 petition.

Where the Court directed advertisements for three *successive* weeks, and the last appeared, by mistake, on a Monday instead of on the previous Saturday, the direction was held to have been sufficiently complied with (*m*).

Under the Act of 1856, a petition was not allowed to be set down for hearing until three weeks after the last advertisement (*n*); and Lord ROMILLY, M.R., refused to relax the rule even where the effect was to throw the petition over the long vacation (*o*). On the other hand, BACON, V.-C., was accustomed to allow a petition to be put in the paper on the last petition-day before the long vacation, although the three weeks might not have expired (*p*).

<sup>3</sup> Such a motion might, under the Act of 1856, be made within seven clear days after the last advertisement, but not later without special leave, and any order on such motion must be served on the petitioner within four days from the making thereof (*q*). After the expiration of the seven days, special leave was not given unless some reason or excuse for the delay was shown (*r*). Now the motion may be made *ex parte* or on notice within the time named in the advertisement (*s*). If leave is given on an *ex parte* motion, the order giving leave is to be served on the petitioner's solicitor (*t*). Any person who has obtained such leave may peruse the petition on payment of 13s. 4d., and may take copies under R. S. C. 1875, Ord. V. (*u*).

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WHEN COURT MAY EXERCISE POWERS.

40 & 41  
 Vict. c. 18,  
**§ 32.**

No appli-  
 cation  
 under this  
 Act to be  
 granted  
 where a  
 similar  
 applica-  
 tion has

**32.<sup>1</sup>** The Court shall not be at liberty to grant any application under this Act in any case where the applicant, or any party entitled, has previously applied to either House of Parliament<sup>2</sup> for a private Act to effect the same or a similar object, and such application has been rejected on its merits,<sup>3</sup> or reported against by the judges to whom the bill may have been referred.

<sup>1</sup> This is a *verbatim* re-enactment of s. 21 of the Act of 1856.

(*m*) *Re Monkton Parleigh*, 4 N. R. 221.

(*n*) Cons. Ord. XLI., r. 20.

(*o*) *Re Townsend*, L. R. 14 Eq. 433.

(*p*) *Re Bower*, 18 W. R. 1085; *Re Taylor*, L. R. 14 Eq. 557; *Re Adam*,

6 L. T. N. S. 604.

(*q*) Cons. Ord. XLI., r. 17.

(*r*) *Re Merry*, 14 W. R. 665.

(*s*) S. E. A. Orders, 1878. Ord. 19.

(*t*) *Ibid.* Ord. 21.

(*u*) *Ibid.* Ord. 20.

<sup>2</sup> The Court must be satisfied by “sufficient evidence” that no such application has been made and rejected, or reported against (*x*). 40 & 41  
Vict. c. 18,  
§ 32.

<sup>3</sup> Where such an application has been made and refused the Court will presume that it has been rejected on the merits unless it is shown to have been refused in consequence of some informality (*y*). been  
rejected by  
Parlia-  
ment.

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### NOTICE OF ORDER.

**33.**<sup>1</sup> The Court shall direct that some sufficient notice of any exercise of any of the powers conferred on it by this Act shall be placed on the settlement or on any copies thereof,<sup>2</sup> or otherwise recorded in any way it may think proper,<sup>3</sup> in all cases where it shall appear to the Court to be practicable and expedient for preventing fraud or mistake. 40 & 41  
Vict. c. 18,  
§ 33.  
Notice of  
the exer-  
cise of  
powers to  
be given as  
directed by  
the Court.

<sup>1</sup> This is a *verbatim* re-enactment of sect. 22 of the Act of 1856.

<sup>2</sup> Every order made under the Act must specify on what document or documents (if any) the notice shall be placed, and the judge may require the production, in Court, of such document or documents, when indorsed, for his inspection (*z*).

<sup>3</sup> Where the order relates to land in a register county the Court may order a memorial of the order to be registered; and where the Court shall not think it practicable or expedient that any record of the order should be made, the order is to contain a statement to that effect (*a*).

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### SALES—REINVESTMENT.

**34.**<sup>1</sup> All money to be received on any sale effected under the authority of this Act, or to be set aside out of the rent or payments reserved on any lease of earth, coal, stone, or minerals as aforesaid, may, if the Court shall think fit, be paid to any trustees of whom it shall approve,<sup>2</sup> or otherwise the same, so far as relates to estates in England, shall be paid into Court *ex parte* the applicant in the matter of this Act, and so far as relates to estates in Ireland, shall be paid into the bank of Ireland to the account of the Accountant-General *ex parte* the 40 & 41  
Vict. c. 18,  
§ 34.  
Payment  
and appli-  
cation of  
moneys  
arising  
from sales  
or set  
aside out  
of rent, &c.,

(*x*) S. E. A. Orders, 1878. Ord. 17.

(*y*) *Re Wilson*, 1 L. T. N. S. 25.

(*z*) Cons. Ord. XLI., r. 24.

(*a*) S. E. A. Orders, 1878. Ord. 23.

40 & 41  
Vict. c. 18,  
§ 34.

reserved  
on mining  
leases.

applicant in the matter of this Act; and such money shall be applied, as the Court shall from time to time direct, to some one or more of the following purposes, namely—

So far as relates to estates in England the purchase or redemption of the land tax, and so far as relates to estates in Ireland the purchase or redemption of rent-charge in lieu of tithes, Crown rent, or quit rent.

The discharge or redemption of any incumbrance affecting the hereditaments in respect of which such money was paid, or affecting any other hereditaments subject to the same uses or trusts; or

The purchase of other hereditaments to be settled in the same manner as the hereditaments in respect of which the money was paid;<sup>3</sup> or

The payment to any person becoming absolutely entitled.<sup>4</sup>

<sup>1</sup> This is a re-enactment, with some alteration, of the provisions of s. 23 of the Act of 1856. By that section the money was ordered (if not paid to trustees) to be paid into the Bank of England or the Bank of Ireland as the case might be, and “in either case” to be applied as the Court should direct, &c.

In the Act of 1856 the provisions embodied in the first and second sub-sections of the above section were grouped together as the first sub-section, and no distinction was made between estates in England and Ireland, but the provision as to purchase or redemption of land-tax applied to both.

Payment  
of proceeds  
of sale to  
trustees.

<sup>2</sup> Where real estate was settled in trust for the separate use of a married woman for life, and after her death upon trust for sale and division of the proceeds, the purchase-money was paid to the trustees of the settlement to hold upon the trusts thereof (b), and in another case (c) was paid to the trustees of a will. Leaseholds for lives were devised on trust for J. in fee, but, if he should die without leaving issue living at his death, then on trust for W. in fee, and there was an overriding trust for renewal of the lease out of the rents. After the death of the testator the reversioner refused to renew the lease or to sell the reversion, and the lease was sold under the provisions of the Settled Estates Act. It was held that the purchase-money must be invested in ordinary securities, and the income only paid to J. for his life (d).

(b) *Re Morgan*, L. R. 9 Eq. 587.  
(c) *Re Hemsley*, 43 L. J. Ch. 72.

(d) *Re Barber*, 18 Ch. D. 624.

<sup>3</sup> On a reinvestment in land, where the original trustees were dead, new trustees were appointed, the petition being amended for that purpose (e). 40 & 41  
Vict. c. 18,  
§ 34.

The Court has jurisdiction to allow an investment on mortgage instead of purchase of real estate (f).

In 1869 *STUART*, V.-C., allowed purchase money to be invested in (a) new farm buildings, (β) the repair of old buildings, and (γ) the construction of roads and drains which were proved to be for the benefit of the estate (g); and in 1874 *JAMES* and *MELLISH*, L. JJ., sanctioned the investment of the proceeds of sale of timber in (α) building new hop kilns and granary, (β) the conversion of old hop kilns into cottages, (γ) various repairs and alterations on farms, and (δ) drainage works, all of which would permanently increase the value of the property (h). Where part of the settled estate had been damaged by the overflowing of a river, the application of part of the proceeds of sale in making an embankment was authorised (i). In a case (k), however, where trust money was by will directed to be laid out "in the purchase of lands, tenements, and hereditaments," to be conveyed to the uses declared by the will, *JAMES*, L. J., remarked:—"I think, therefore, that the cases in which moneys arising under the *Settled Estates Act* or the *Land Clauses Act* have been applied in what is not strictly a purchase of land are authorities in point. . . . We never intended, however, to go further than this—that the expending money in building a house on a vacant piece of ground forming part of the settled property is, in substance, the same thing as buying a house; and that money to be invested in the purchase of real estate may therefore be properly applied in the erection of new buildings. Repairs and permanent improvements do not come within this principle. I am, therefore, of opinion that the proposed expenditure in reinstating the mansion cannot be sanctioned, nor any outlay on permanent improvements which do not put new buildings on the ground. But I consider that the proposed outlay in the erection of new farm-houses, cottages, and other buildings, whether in addition to those existing before, or in substitution for such as have become so ruinous that they must be taken down, is an allowable mode of applying the money, provided the judge be satisfied that it is beneficial to the estate" (l). Where a petition was presented by a trustee who had expended his own money in rebuilding the burnt-down mansion house, that the sum so expended should be repaid out of funds in court and by a sale or mortgage of part of the settled estates, it was held that the

New building a reinvestment, but repair of old buildings not.

(e) *Re Sexton Barns*, 10 W. R. 416. 682.

(f) *Wall v. Hall*, 11 W. R. 298.

(g) *Re Clitheroe*, 17 W. R. 345.

(h) *Re Newman*, L. R. 9 Ch. 681,

(i) *Re Leadbitter*, 30 W. R. 378.

(k) *Drake v. Trefusis*, L. R. 10 Ch. 364.

(l) *Ibid.*, 366, 367.

40 & 41 Vict. c. 18, § 34. Court had no jurisdiction to order a sale or mortgage, or to authorise the repayment out of moneys which were subject to a trust for reinvestment in land (*m*).

Roads and drains. And in 1876 it was held by JESSEL, M. R., that the construction of roads and drains was not an authorised mode of investment (*n*). But see now s. 21, *ante*, p. 423, which authorises such an application of "investments representing moneys liable to be laid out in the purchase of hereditaments to be settled in the same manner as the settled estates."

In addition to the investments specified in this section a tenant for life will be allowed to invest money in court representing proceeds of sale in any mode of investment authorised by s. 21 of the S. L. A. 1882 (*o*).

"Absolutely entitled." Under the corresponding section of the *Lands Clauses Act*, trustees with a power of sale were held, by the Court of Appeal, to be "absolutely entitled" (*p*). On payment out to a tenant-in-tail there is a conflict of authority whether or not a disentailing deed is necessary (*q*). In one case, KINDERSLEY, V.-C., required not only a disentailing deed, but also an affidavit that there were no incumbrances (*r*). And in a recent case in lunacy the LORDS JUSTICES refused to order payment out of Court of money representing a base fee, except upon production of a deed enlarging the base fee (*s*).

Where an appointment was made by will of the surface of land to A. and of the minerals under it to B., it was held that the accumulations of rent, prior to the testatrix's death, under a lease made under the Settled Estates Act, went to A. (*t*).

As to the application of the equitable doctrine of conversion to the proceeds of sale, on the death of a person entitled thereto, see cases cited under s. 8 of the Partition Act, 1868 (*u*).

40 & 41 Vict. c. 18, § 35.

Trustees may apply moneys in certain cases without application to Court.

35.<sup>1</sup> The application of the money in manner aforesaid may, if the Court shall so direct, be made by the trustees<sup>2</sup> (if any) without any application to the Court, or otherwise upon an order of the Court upon the petition<sup>3</sup> of the person who would be entitled to the possession or the receipt of the rents and profits of the land if the money had been invested in the purchase of land.

<sup>1</sup> This section is a *verbatim* re-enactment of s. 24 of the Act of 1856.

(*m*) *Jesse v. Lloyd*, W. N. 1883, p. 88.

(*n*) *Re Venour*, 2 Ch. D. 522.

(*o*) *Re Mackenzie*, 23 Ch. D. 750,

(*p*) *Re Hobson*, 7 Ch. D. 708.

(*q*) *Re Wood*, L. R. 20 Eq. 372;

*Re Broadwood*, 1 Ch. D. 438.

(*r*) *Thornhill v. Milbank*, 12 W. R. 523.

(*s*) *Re Reynolds*, 3 Ch. D. 61.

(*t*) *Re Scarth*, 10 Ch. D. 499.

(*u*) P. 122, *ante*.



<sup>2</sup> The proceeds of sale have been ordered to be paid to the trustees (x) on the hearing of the petition for sale, with a direction that such proceeds were to be applied pursuant to s. 34 (y). But a sale out of court will not be allowed (z), although a tenant for life can now sell out of court under the S. L. A. 1883.

40 & 41  
Vict. c. 18,  
**§ 35.**

A petition under this section need not be advertised under s. 31 (a), nor served upon all the persons mentioned in s. 24, *ante* (b).

TEMPORARY INVESTMENT.

**36.**<sup>1</sup> Until the money can be applied as aforesaid, the same shall be invested<sup>2</sup> as the Court shall direct in some or one of the investments in which cash under the control of the Court is for the time being authorised to be invested,<sup>3</sup> and the interest and dividends of such investments shall be paid to the person who would have been entitled to the rents and profits of the land if the money had been invested in the purchase of land.

40 & 41  
Vict. c. 18,  
**§ 36.**

Until  
money can  
be applied  
to be  
invested,  
and  
dividends  
to be paid  
to parties  
entitled.

<sup>1</sup> This is an amended re-enactment of the provisions of s. 25 of the Act of 1856, which mentioned exchequer bills and consols only as interim investments, and the question often arose whether or not this authorised an investment in any other mode in which "cash under the control of the Court" generally might be invested (c).

<sup>2</sup> An investment is not made without a written request by the solicitor of the person desiring the investment; and where no such request had been made, the Court refused to allow proceedings to be taken against the Accountant-General in respect of money that had remained uninvested for four years (d).

<sup>3</sup> "Cash under the control of the Court may be invested in bank stock, East India stock, exchequer bills, and 2*l.* 10*s.* per cent. annuities, and upon mortgage of freehold and copyhold estates respectively in England and Wales, as well as in consolidated 3*l.* per cent. annuities, reduced 3*l.* per cent. annuities, and new 3*l.* per cent. annuities" (e).

(x) *Re Peacock*, 15 W. R. 100.

(y) *Re Hoare*, 30 W. R. 177.

(z) *Re Dryden*, 29 W. R. 884.

(a) *Re Sexton Barns*, 10 W. R. 416.

(b) *Re Duke of Cleveland*, 1 Dr. & Sm. 481.

(c) *Re Cook*, L. R. 12 Eq. 12. *Re Shaw*, L. R. 14 Eq. 9. *Re Boyd*, 21 W. R. 667. *Re Thorold*, L. R. 14 Eq.

31. *Re Taddy*, L. R. 16 Eq. 532.

Compare *Re Birmingham Blue Coat School*, L. R. 1 Eq. 632. *Re Broadwood*, 24 W. R. 108. *Langmead v. Cockerton*, 25 W. R. 315.

(d) *Re Woodcock*, L. R. 13 Eq. 183.

(e) 23 & 24 Vict. c. 38, s. 10, and Rule 1 of Feb. 1861.



40 & 41 It has been held that an order for interim investment should specify  
 Vict. c. 18, the security to be invested in and not give the trustees liberty to select  
**§ 36.** one of several investments (*f*).

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#### INVESTMENT—LEASES AND REVERSIONS.

40 & 41 **37.**<sup>1</sup> Where any purchase money paid into Court under  
 Vict. c. 18, the provisions of this Act shall have been paid in respect of  
**§ 37.** any lease for a life or lives or years, or for a life or lives and  
 Court may direct application of money in respect of leases or reversions as may appear just. years, or any estate in lands less than the whole fee simple thereof, or of any reversion dependent on any such lease or estate, it shall be lawful for the Court, on the petition of any party interested in such money, to order that the same shall be laid out, invested, accumulated, and paid in such manner as the said Court may consider will give to the parties interested in such money the same benefit therefrom as they might lawfully have had from the lease, estate, or reversion in respect of which such money shall have been paid, or as near thereto as may be.

<sup>1</sup> This section is new.

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#### POWERS OF COURT—GENERALLY.

40 & 41 **38.**<sup>1</sup> The Court shall be at liberty to exercise any of the  
 Vict. c. 18, powers conferred on it by this Act, whether the Court shall  
**§ 38.** have already exercised any of the powers conferred by this  
 Court may exercise powers repeatedly, but may not exercise them if expressly negatived. Act in respect of the same property or not; but no such powers shall be exercised if an express declaration<sup>2</sup> that they shall not be exercised is contained in the settlement:<sup>3</sup> Provided always, that the circumstance of the settlement containing powers to effect similar purposes shall not preclude the Court from exercising any of the powers conferred by this Act, if it shall think that the powers contained in the settlement ought to be extended.

(*f*) *Re Taylor*, 28 W. R. 594.

<sup>1</sup> This is a re-enactment, with amendments, of s. 26 of the Act of 1856. 40 & 41  
Vict. c. 18,  
**§ 38.**

<sup>2</sup> The words “or manifest intention” were inserted here, in the Act of 1856. Where a testator recorded his “express desire” that a mansion house should not be let, the Court refused to authorise a lease, although of opinion that such a lease would clearly be for the benefit of the estate and all persons interested therein (*g*).

<sup>3</sup> The words “or may reasonably be inferred therefrom, or from extrinsic circumstances or evidence” which occurred here, have been omitted.

POWERS OF COURT—HOW LIMITED.

**39.** Nothing in this Act shall be construed to empower the Court to authorise any lease, sale, or other act beyond the extent to which in the opinion of the Court the same might have been authorised in and by the settlement by the settlor or settlors. 40 & 41  
Vict. c. 18,  
**§ 39.**

This is a *verbatim* re-enactment of s. 27 of the Act of 1856.

Court not to authorise any act which could not have been authorised by the settlor.

POWERS OF COURT—ACTS TO BE VALID.

**40.** After the completion of any lease or sale or other act under the authority of the Court, and purporting to be in pursuance of this Act, the same shall not be invalidated on the ground that the Court was not hereby empowered to authorise the same,<sup>8</sup> except that no such lease, sale, or other act shall have any effect against<sup>1</sup> such person as herein mentioned whose concurrence or consent ought to be obtained, or who ought to be served with notice, or in respect of whom an order dispensing with such service ought to be obtained in the case where such concurrence or consent has not been obtained and such service has not been made or dispensed with.<sup>2</sup> 40 & 41  
Vict. c. 18,  
**§ 40.**

Acts of the Court in professed pursuance of this Act not to be invalidated.

(*g*) *Re Cleveland*, 22 W. R. 818.

40 & 41 This section was amended by s. 70 of the C. A. 1881, which is as  
 Vict. c. 18, follows:—

**§ 40.**

44 & 45  
 Vict. c. 41.

**§ 70.**

Orders of  
 Court  
 under S. E.  
 A. con-  
 clusive by  
 virtue of  
 C. A. 1881,  
 s. 70.

[70. (1.) An order of the Court under any statutory or other jurisdiction shall not, as against a purchaser, be invalidated on the ground of want of jurisdiction, or of want of any concurrence, consent, notice, or service, whether the purchaser has notice of any such want or not.

(2.) This section shall have effect with respect to any lease, sale, or other act under the authority of the Court, and purporting to be in pursuance of the Settled Estates Act, 1877, notwithstanding the exception in s. 40 of that Act, or to be in pursuance of any former Act repealed by that Act, notwithstanding any exception in such former Act.

(3.) This section applies to all orders made before or after the commencement of this Act, except any order which has before the commencement of this Act been set aside or determined to be invalid on any ground, and except any order as regards which an action or proceeding is at the commencement of this Act pending for having it set aside or determined to be invalid.]

<sup>1</sup> Down to this point, section 40 is a re-enactment of s. 28 of the Act of 1856, but the latter concluded as follows: “any person whose concurrence in or consent to the application ought to have been obtained, and was not obtained.”

<sup>2</sup> See ss. 24 to 29 inclusive, and cases there cited (*g*).

<sup>3</sup> This section removes any objection which might be taken to the title by a subsequent purchaser, on the ground of irregularity in the proceedings under the Act (*h*).

“The effect of the 28th section (of the Act of 1856) is that it has no operation if the order for sale was right, and if it was not right, any informality in it will not be allowed to interfere with the validity of the sale.” *Per* GIFFARD, L. J. (*i*). A sale under the Act could not be invalidated even before 1882, except as against a person mentioned in this section (*k*). A purchaser might formerly raise any objection in

(*g*) Pp. 427 to 433, *ante*.

(*h*) *Beioley v. Carter*, L. R. 4 Ch. 230—239.

(*i*) L. R. 4 Ch. 242.

(*k*) *Re Shephard*, L. R. 8 Eq. 571—573.

respect of the proceedings after the order for sale and before completion; but after the execution of his conveyance his title was good (*l*). 40 & 41  
Vict. c. 18,  
**§ 40.**

And now, although an order under this Act may appear, upon the face of it, to be irregular, the purchaser has a good title and will not be allowed to raise any objection as to any matter mentioned in s. 70 of the C. A. 1881 (*m*).

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POWERS OF COURT—COSTS.

**41.**<sup>1</sup> It shall be lawful for the Court, if it shall think fit, to order that all or any costs or expenses of all or any parties of and incident to any application under this Act shall be a charge on the hereditaments which are the subject of the application, or on any other hereditaments included in the same settlement and subject to the same limitations; and the Court may also direct that such costs and expenses shall be raised by sale or mortgage of a sufficient part of such hereditaments, or out of the rents or profits thereof, such costs and expenses to be taxed as the Court shall direct. 40 & 41  
Vict. c. 18,  
**§ 41.**  
Costs.

<sup>1</sup> This is a *verbatim* re-enactment of s. 29 of the Act of 1856.

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RULES MAY BE MADE.

**42.**<sup>1</sup> General rules and orders of Court for carrying into effect the purposes of this Act, and for regulating the times and form and mode of procedure, and generally the practice of the Court in respect of the matters to which this Act relates, and for regulating the fees and allowances to all officers and solicitors of the Court in respect to such matters, shall be made,<sup>2</sup> so far as relates to proceedings in England, by any three or more of the following persons, of whom the Lord Chancellor shall be one, namely, the Lord Chancellor, the Lord Chief Justice of England, the Master of the Rolls, 40 & 41  
Vict. c. 18,  
**§ 42.**  
Rules and  
orders.

(*l*) *Re Thompson*, Joh. 418. Compare *Re Clough*, L. R. 15 Eq. 284.

(*m*) *Re Hall Dare*, 21 Ch. D. 41.

40 & 41  
Vict. c. 18,  
§ 42.

the Lord Chief Justice of the Common Pleas, the Lord Chief Baron of the Exchequer, and four other judges of the Supreme Court of Judicature, to be from time to time appointed for the purpose by the Lord Chancellor in writing under his hand, such appointment to continue for such time as shall be specified therein; and so far as relates to proceedings in Ireland by any three or more of the following persons, of whom the Lord Chancellor of Ireland shall be one, namely, the Lord Chancellor of Ireland, the Lord Chief Justice of Ireland, the Master of the Rolls in Ireland, the Lord Chief Justice of the Common Pleas, and the Lord Chief Baron, and four other judges of the superior courts in Ireland, to be from time to time appointed for the purpose by the Lord Chancellor of Ireland in writing under his hand, such appointment to continue for such time as shall be specified therein, and such rules and orders may from time to time be rescinded or altered by the like authorities respectively, and all such rules and orders shall take effect as general orders of the Court.

<sup>1</sup> This is a re-enactment of the provisions of s. 30 of the Act of 1856, except that the judges to whom the power of making orders is given are not the same.

The orders made under this section will be found at pp. 459—470, *post*.

40 & 41  
Vict. c. 18,  
§ 43.

Rules and  
orders to  
be laid  
before Par-  
liament.

**43.**<sup>1</sup> All general rules and orders made as aforesaid shall be laid before each House of Parliament within forty days after the making thereof, if Parliament is then sitting, or if not, within forty days after the commencement of the then next ensuing session; and if an address is presented to Her Majesty by either House of Parliament within the next subsequent forty days on which the said House shall have sat, praying that any such rule or order may be annulled, Her Majesty may thereupon by Order in Council annul the same,<sup>2</sup> and the rule or order so annulled shall thenceforth become void and of no effect, but without prejudice to the validity of any proceedings which may in the meantime have been taken under the same.<sup>3</sup>

<sup>1</sup> This is a re-enactment, with considerable alterations, of s. 31 of the Act of 1856. That section provided that the rules should be laid

before both Houses immediately, or within twenty-one days after the next meeting thereof; and either House might, *mero motu*, rescind any rule by a resolution, passed within thirty-six days, that such rule ought not to continue in force.

40 & 41  
Vict. c. 18,  
**§ 43.**

<sup>2</sup> Now it will be seen that an address and an Order in Council are necessary to annul any rule. Compare s. 25 of the Judicature Act, 1875 (*n*), the terms of which are almost identical.

<sup>3</sup> The Act of 1856 contained no saving in favour of intermediate proceedings.

POWERS OF COURT—LANCASTER.

**44.**<sup>1</sup> The powers vested in the High Court of Justice by this Act may, so far as relates to estates within the County Palatine of Lancaster, be exercised also by the Court of Chancery of the said County Palatine; and general rules and orders of Court for the purposes aforesaid, so far as relates to proceedings in the said Court of the said County Palatine, shall be made by the Chancellor of the Duchy and County Palatine of Lancaster, with the advice and consent of any one or more of the persons authorised under this Act to concur in the making of general rules and orders relating to proceedings in England, and also with the advice and consent of the Vice-Chancellor of the said County Palatine.

40 & 41  
Vict. c. 18,  
**§ 44.**

Concur-  
rent juris-  
diction of  
the Court  
of Chan-  
cery of the  
County  
Palatine of  
Lancaster.

<sup>1</sup> This section is new.

POWERS OF COURT—IRELAND.

**45.**<sup>1</sup> It shall and may be lawful for any person who under the provisions of this Act may make an application to the Court of Chancery in Ireland for the lease or sale of a settled estate, instead of making such application to the said Court of Chancery in Ireland to apply to the Landed Estates Court, Ireland,<sup>2</sup> for the purpose of having the lease or sale of such settled estate under the said last-mentioned Court; and thereupon it shall be lawful for the said Landed Estates Court, Ireland, to exercise all the powers conferred upon the Court

40 & 41  
Vict. c. 18,  
**§ 45.**

Applica-  
tion for  
lease or  
sale in Ire-  
land may  
be made  
to Landed  
Estates  
Court.

(*n*) 38 & 39 Vict. c. 77.

40 & 41  
Vict. c. 18,  
**§ 45.**

of Chancery in Ireland in relation to leases or sales of such nature under the provisions of this Act, save that the judge in the case of a sale shall himself execute the conveyance to the purchaser under such sale, and save that such conveyance shall have the like operation and effect, and confer such indefeasible title to the purchaser as if such sale had been made and such conveyance had been executed upon an application for the sale of an incumbered estate under the Act of the twenty-first and twenty-second years of Her Majesty, chapter seventy-two: Provided always, that the Landed Estates Court, Ireland, shall make such investigation of the title and circumstances of the said estates as shall appear expedient, and also in cases of sales as in other cases preliminary to sales conducted in the said Landed Estates Court, Ireland: Provided also, that every decision and order in the course of such proceedings shall be subject to appeal to the Court of Appeal in Chancery as in other cases under the said Act.

<sup>1</sup> This section is new.

<sup>2</sup> The Landed Estates Court is now consolidated with the High Court of Justice in Ireland (*o*), and the former judges thereof are now judges of the Chancery Division; but their peculiar jurisdiction is expressly preserved (*p*).

#### POWERS OF LEASING—TENANTS FOR LIFE.

40 & 41  
Vict. c. 18,  
**§ 46.**

Tenants  
for life, &c.,  
may grant  
leases for  
twenty-  
one years.

**46.**<sup>1</sup> It shall be lawful for any person entitled to the possession or to the receipt of the rents and profits of any settled estates for an estate for any<sup>2</sup> life, or for a term of years determinable with any<sup>2</sup> life or lives, or for any greater estate, either in his own right or in right of his wife, unless the settlement shall contain an express declaration that it shall not be lawful for such person to make such demise; and also for any person entitled to the possession or to the receipt of the rents and profits of any unsettled estates as

(*o*) 40 & 41 Vict. c. 57, s. 4.

(*p*) *Ibid.*, s. 7. See also s. 36.

tenant by the courtesy, or in dower, or in right of a wife who is seised in fee, without any application to the Court, to demise the same or any part thereof, except the principal mansion house and the demesnes thereof, and other lands usually occupied therewith, from time to time, for any term not exceeding twenty-one years so far as relates to estates in England, and thirty-five years so far as relates to estates in Ireland,<sup>3</sup> to take effect in possession at or within one year next after the making thereof;<sup>4</sup> provided that every such demise be made by deed, and the best rent that can reasonably be obtained be thereby reserved, without any fine or other benefit in the nature of a fine, which rent shall be incident to the immediate reversion; and provided that such demise be not made without impeachment of waste, and do contain a covenant for payment of the rent, and such other usual and proper covenants as the lessor shall think fit, and also a condition of re-entry<sup>5</sup> on non-payment of the rent for a period of twenty-eight days after it becomes due, or for some less period to be specified in that behalf; and provided a counterpart of every deed of lease be executed by the lessee.<sup>6</sup>

40 & 41  
Vict. c. 18,  
**§ 46.**

Tenant for  
life may  
grant  
leases.

<sup>1</sup> This is a re-enactment, with amendments, of s. 32 of the Act of 1856.

<sup>2</sup> The insertion of the word "any" before "life" confers the same powers upon a tenant *pur autre vie* as upon a tenant for life. It is to be regretted that the same alteration was not made in s. 23 (q).

"The appointment of a receiver would not take away the power of the tenant for life to grant leases under the 46th section. It might hamper him in the exercise of the power to this extent, that he would have to come to the Court for leave to grant the lease, or otherwise he would be interfering with the officer of the Court."—*Per* CHITTY, J. (r).

Effect of  
appoint-  
ment of  
receiver.

In a case (s) under the Act of 1856, certain estates were settled upon trusts under which the trustees received the whole income in trust to pay two-fifths to the testator's widow, and to apply the remaining three-fifths in payment of expenses incurred in managing the entirety, and to pay the surplus to the widow; and it was held by JESSEL, M. R., that the widow could not grant a valid lease. In a similar case, under the Act of 1877, the trustees would probably be able to do so.

(q) P. 425, *ante*.

(r) *Vine v. Raleigh*, 24 Ch. D. 243.

(s) *Taylor v. Taylor*, L. R. 20 Eq.

297. Compare also 1 Ch. D. 426.



40 & 41  
Vict. c. 18,  
**§ 46.**

<sup>3</sup> In the Act of 1856, the length of lease authorised for Irish, as well as English, estates was twenty-one years.

<sup>4</sup> The words "at or within one year after the making thereof" are new.

<sup>5</sup> By the Act of 1856 the condition of re-entry was required to be on non-payment of rent for a period *not less than* twenty-eight days, and to extend to breaches of covenant.

<sup>6</sup> See s. 48, and compare the provisions of ss. 6 to 14 of the S. L. A. 1882, p. 479, *post*.

Where, under a settlement, power to lease was given to the tenant for life, and after his death to trustees during the minority of the tenant in tail, it was held that the trustees might, after the death of the tenant for life, execute a lease which he had agreed to grant (*t*).

#### VALIDITY OF LEASES UNDER SECT. 46.

40 & 41  
Vict. c. 18,  
**§ 47.**

Against  
whom  
such leases  
shall be  
valid.

**47.<sup>1</sup>** Every demise authorised by the last preceding section shall be valid against the person granting the same, and all other persons entitled to estates subsequent to the estate of such person under or by virtue of the same settlement if the estates be settled, and in the case of unsettled estates against the wife of any husband granting such demise of estates to which he is entitled in right of such wife, and against all persons claiming through or under the wife or husband (as the case may be) of the person granting the same.

<sup>1</sup> This section merely consolidates the provisions contained in sect. 33 of the Act of 1856 and sect. 8 of that of 1858.

40 & 41  
Vict. c. 18,  
**§ 48.**

Evidence  
of execu-  
tion of  
counter-  
part lease  
by lessee.

**48.<sup>1</sup>** The execution of any lease by the lessor or lessors shall be deemed sufficient evidence that a counterpart of such lease has been duly executed by the lessee as required by this Act.

<sup>1</sup> This is a *verbatim* re-enactment of sect. 34 of the Act of 1856.

Sect. 35 of the last-mentioned Act merely repealed 32 Hen. VIII., c. 28, and 10 Car. I., sess. 3, c. 6.

(*t*) *Davis v. Harford*, 22 Ch. D. 128.

INFANTS AND LUNATICS.

**49.**<sup>1</sup> All powers given by this Act, and all applications to the Court under this Act, and consents to and notifications respecting such applications, may be executed, made, or given by, and all notices under this Act may be given to guardians on behalf of infants,<sup>2</sup> and by or to committees on behalf of lunatics,<sup>3</sup> and by or to trustees or assignees of the property of bankrupts, debtors in liquidation, or insolvents: Provided nevertheless that, in the case of infant or lunatic tenants-in-tail, no application to the Court or consent to or notification respecting any application may be made or given by any guardian or committee without the special direction of the Court.<sup>4</sup>

40 & 41  
Vict. c. 18,  
§ 49.

Provisiön  
as to  
infants,  
lunatics,  
&c.

<sup>1</sup> Sect. 36 of the Act of 1856 was as follows:—

*"All powers given by this Act, and all applications to the Court under this Act, and consents to such applications, may be exercised, made, or given by guardians on behalf of infants, and by committees on behalf of lunatics, and by assignees of bankrupts or insolvents; Provided nevertheless that, in the cases of infant or lunatic tenants-in tail, no application may be made or given by any guardian or committee without the special direction of the Court."*

<sup>2</sup> Lord HATHERLEY, when Vice-Chancellor, considered that a testamentary guardian came within the words of the Act of 1856, but held that, having regard to the terms of Cons. Orl. XLI., r. 23, and the judges' regulations thereunder, a special guardian must be appointed in chambers to consent on behalf of an infant remainderman (*u*). It had previously been held that a father could not consent on behalf of his infant son, although he had no interest adverse to him (*x*). When an infant petitioner is a married woman, she must be examined pursuant to sect. 50 (*y*). Infants  
and  
lunatics.

The S. E. A. Orders, 1878 (*z*), provide for the appointment of a guardian, in the case of an infant petitioner or respondent. The application is made by summons in chambers after presentation of the petition, which summons must be served on the parent, testamentary guardian, or guardian appointed by the Court, unless such service is dispensed with. The summons must be supported by evidence as to the following facts:—

- |   |  |
|---|--|
| ( <i>u</i> ) <i>Re James</i> , L. R. 5 Eq. 334. | 2 Ch. D. 29.   |
| ( <i>x</i> ) <i>Re Cuddick</i> , 7 W. R. 334.   | ( <i>y</i> ) <i>Re Broadwood</i> , L. R. 7 Ch. 323.  |
| Compare <i>Re Marquis of Salisbury</i> ,        | ( <i>z</i> ) Orders 5—12, pp. 460—462, <i>post</i> . |

40 & 41  
Vict. c. 18,  
**§ 49.**

1. The age of the infant. 2. Whether he has any parent, testamentary guardian, or guardian appointed by the Court, and if so, whether such guardian has any, and what, interest in the application. 3. Where and under whose care the infant is residing, and at whose expense he is maintained. 4. In what way the proposed guardian is connected with the infant, and why proposed, and how qualified to be appointed. 5. That the proposed guardian has no interest in the intended application, or if he has, the nature of his interest, and that it is not adverse to the interest of the infant. 6. The consent of the proposed guardian to act.

<sup>3</sup> The committee of a lunatic must obtain the consent of the Lords Justices under their lunacy jurisdiction, before he can bind the lunatic under this section (a). Where a lunatic was merely entitled to an annuity of 200*l.* out of the property, his consent was dispensed with (b).

Persons of  
unsound  
mind.

The Act of 1856 contained no provision for the case of a person of unsound mind, not so found; and the Act of 1877 does not remedy this defect. It was considered, in 1868, that such a person might consent by a guardian, appointed in the same manner as in the case of an infant (c); but in 1873 it was held that the Court had no power to appoint a guardian in such a case (d). Where the person of unsound mind is a respondent, the difficulty may now be surmounted by serving a notice under sect. 26 (e), on the person of unsound mind, and the persons under whose care he is placed (f); but where it is desirable for him to be a petitioner, the only course appears to be to take proceedings in lunacy.

<sup>4</sup> Under the Act of 1856, these directions were obtained by *ex parte* summons (g), and it was laid down that the guardian or committee should make an affidavit of his belief that the application was for the benefit of the infant or lunatic, and adduce such other evidence as the case might require to show the propriety of the application, so far as the infant or lunatic was concerned; and the petition was required to be produced (h).

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### MARRIED WOMEN.

40 & 41  
Vict. c. 18,  
**§ 50.**

A married  
woman

**50.<sup>1</sup>** Where a married woman<sup>2</sup> shall apply to the Court, or consent to an application to the Court, under this Act, she shall first be examined<sup>3</sup> apart from her husband touching her knowledge of the nature and effect of the application, and it

(a) *Re Woodcock*, L. R. 3 Ch. 229.

(b) *Re Turbutt*, 2 N. R. 158.

(c) *Re Venner*, L. R. 6 Eq. 249.

(d) *Re Clough*, L. R. 15 Eq. 284.

(e) P. 430, *ante*.

(f) *Re Crabtree*, L. R. 10 Ch. 203.

(g) Cons. Ord. XLI., r. 23.

(h) Reg., 8 Aug., 1857, r. 22.

shall be ascertained that she freely desires to make or consent to such application; and such examination shall be made whether the hereditaments which are the subject of the application shall be settled in trust for the separate use of such married woman independently of her husband or not; and no clause or provision in any settlement<sup>4</sup> restraining anticipation shall prevent the Court from exercising, if it shall think fit, any of the powers given by this Act, and no such exercise shall occasion any forfeiture, anything in the settlement contained to the contrary notwithstanding.

40 & 41  
Vict. c. 18,  
§ 50.

applying to  
the Court,  
or consent-  
ing to be  
examined  
apart from  
her hus-  
band.

<sup>1</sup> This is a *verbatim* re-enactment of sect. 37 of the Act of 1856.

<sup>2</sup> An examination under this section is not necessary in the case of a woman married since 31st December, 1882, as she is, by virtue of sect. 1 of the M. W. P. A. 1882, in the position of a *feme sole* (h). This section applies to the case of an infant petitioner, who is a married woman (i), as well as to married women of full age. See sect. 52, *post*. But where a female petitioner married between the presentation and hearing of the petition, her examination was dispensed with (j). And the separate examination of married women interested in settled estates of which leases were authorised, has been dispensed with in the following cases:— Where the application was clearly for the benefit of all parties, and the married woman was resident in New Zealand (k). Where the married woman (petitioner) was entitled to a life estate with a possibility of an absolute interest, and was resident in America (l). Where her interest was remote, and was represented by trustees who consented (m).

Examina-  
tion, when  
necessary.

A similar course has been adopted in the case of a sale of estates, in which a married woman who was abroad was interested (n).

<sup>3</sup> It was, at first, held that when a married woman was a petitioner, her examination must be taken before the presentation of the petition (o); but it was subsequently laid down by the Court of Appeal that it ought to be taken after the presentation of the petition (p). And now it is provided by S. E. A. Ord. 1878, O. 13, p. 462, *post*, that the examination may be taken at any time after the petition is presented and answered.

Examina-  
tion, when  
taken.

Lord HATHERLEY had previously adopted that course, and it has since been held that the examination may be taken at any time before an order is made (q). It is now not unusual to take the examination in Court at

(h) *Riddell v. Errington*, 26 Ch. D. 220.

(i) *Re Broadwood*, L. R. 7 Ch. 323.

(j) *Re Marshall*, L. R. 15 Eq. 66.

(k) *Re Halliday*, L. R. 12 Eq. 199.

(l) *Re Thorne*, 20 W. R. 587.

(m) *Re De Tabley*, 11 W. R. 936.

(n) *Re Tibbett*, 17 W. R. 394. But see *Re Noyes*, 6 W. R. 7.

(o) *Re Brealy*, 24 B. 220; *Re Hadwen*, *ibid.*; *Re Reedley*, 5 W. R. 649.

(p) *Re Foster*, 1 De G. & J. 386.

(q) *Re Packer*, 39 L. J. Ch. 220.

40 & 41  
Vict. c. 18,  
**§ 50.** the hearing (*r*), and it has been taken after the order was made, but before it was drawn up, the petition being mentioned again (*s*).

Where it is desired that the examination shall not be taken by the Court, a perpetual (or in the case of residence abroad a special) commission may be appointed by the judge at chambers (*t*).

<sup>4</sup> Where a married woman consents to an order, an affidavit of no settlement is not necessary (*u*).

#### MARRIED WOMEN—EXAMINATION, HOW TAKEN.

40 & 41  
Vict. c. 18,  
**§ 51.**

Examina-  
tion of  
married  
woman,  
how to be  
taken  
when  
residing  
within the  
jurisdic-  
tion of the  
Court, and  
how when  
residing  
without  
such juris-  
diction.

**51.**<sup>1</sup> The examination of such married woman when resident within the jurisdiction of the Court to which such application is made, shall be made either by the Court or by some solicitor<sup>2</sup> duly appointed by the Court for that purpose, who shall certify under his hand that he has examined her apart from her husband and is satisfied that she is aware of the nature and effect of the intended application, and that she freely desires to make or consent to the same. And when the married woman is resident out of the jurisdiction of the Court to which such application is made, her examination may be made by any person<sup>3</sup> appointed for that purpose by the Court, whether he is or is not a solicitor of the Court, and such person shall certify under his hand to the effect hereinbefore provided in respect of the examination of a married woman resident within the jurisdiction. And the appointment of any such person not being a solicitor shall afford conclusive evidence that the married woman was at the time of such examination resident out of the jurisdiction of the Court.

<sup>1</sup> This section consolidates the provisions of sect. 38 of the Act of 1856 and sect. 6 of the Act of 1858.

<sup>2</sup> The solicitor must be one who actually takes out a certificate in

(*r*) *Re Taylor*, L. R. 14 Eq. 557.

(*s*) *Re Turbutt*, 2 N. R. 487.

(*t*) S. E. A. Ord. 1878. Ord. 14,

p. 462, Ap. Forms 7 & 8, pp. 467-8.

(*u*) *Re Standish*, 25 W. R. 8.

England (*v*), and does not act for the parties to the petition (*x*); but his signature may be attested by the husband's solicitor (*y*).

40 & 41  
Vict. c. 18,  
**§ 51.**

<sup>3</sup> The Act of 1856 did not provide for the case of a married woman being out of the jurisdiction, and was held not to authorise an examination by a writer to the signet (*z*), a Canadian advocate (*a*), or an English solicitor practising in Paris (*b*).

Since 1858 the British consul at Boulogne has been appointed to take an examination (*c*).

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### INFANT MARRIED WOMEN.

**52.<sup>1</sup>** Subject to such examination as aforesaid, married women may make or consent to any applications, whether they be of full age or infants.<sup>2</sup>

40 & 41  
Vict. c. 18,  
**§ 52.**

<sup>1</sup> This is a *verbatim* re-enactment of sect. 39 of the Act of 1856.

<sup>2</sup> See *Re Broadwood* (*d*), cited under section 50.

As to  
application  
by or con-  
sent of  
married  
women,  
whether of  
full age or  
under age.

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### GENERAL PROVISIONS.

#### OPTION TO APPLY, CONSENT, &c.

**53.<sup>1</sup>** Nothing in this Act shall be construed to create any obligation on any person to make or consent to any application to the Court or to exercise any power.

40 & 41  
Vict. c. 18,  
**§ 53.**

<sup>1</sup> This is a *verbatim* re-enactment of sect. 40 of the Act of 1856.

No obliga-  
tion to  
make or  
consent to  
applica-  
tion, &c.

### EFFECT OF INCUMBRANCES.

**54.<sup>1</sup>** For the purposes of this Act, a person shall be deemed to be entitled to the possession or to the receipt of the rents and profits of estates, although his estate may be charged or incumbered either by himself or by the settlor, or otherwise

40 & 41  
Vict. c. 18,  
**§ 54.**

Tenants  
for life, &c.,

(*v*) *Turner v. Turner*, 2 De G. & J. 534; *Re Noyes*, 6 W. R. 7.

(*x*) *Re Brealy*, 5 W. R. 613.

(*y*) *Re Lewis*, 24 W. R. 103.

(*z*) *Re Hooper*, 5 W. R. 670.

(*a*) *Turner v. Turner*, 2 De G. & J. 534.

(*b*) *Re Noyes*, 6 W. R. 7.

(*c*) *Re Johnson*, W. N. (1869) 87.

(*d*) L. R. 7 Ch. 323.

40 & 41  
Vict. c. 18,  
§ 54.

to be  
deemed  
entitled  
notwith-  
standing  
incum-  
brances.

howsoever, to any extent ; but the estates or interests of the parties entitled to any such charge or incumbrance shall not be affected by the acts of the person entitled to the possession or to the receipt of the rents and profits as aforesaid unless they shall concur therein.

<sup>1</sup> This is a *verbatim* re-enactment of sect. 41 of the Act of 1856.

#### PARLIAMENTARY ENTAILS EXCEPTED.

40 & 41  
Vict. c. 18,  
§ 55.

Exception  
as to  
entails  
created by  
Act of  
Parlia-  
ment.

**55.**<sup>1</sup> Provided always, that nothing in this Act shall authorise any sale or lease beyond the term of twenty-one years of any settled estates in respect of which, under the Act of the thirty-fourth and thirty-fifth years of King Henry VIII., c. 20, "to embar feigned recovery of lands wherein the King's Majesty is in reversion," or under any other Act of Parliament, the tenants-in-tail are restrained from barring or defeating their estates tail, or where the reversion is vested in the Crown.

<sup>1</sup> This is a re-enactment with slight verbal amendments of sect. 42 of the Act of 1856.

#### SAVING—LORDS OF MANORS.

40 & 41  
Vict. c. 18,  
§ 56.

Saving  
rights of  
lords of  
manors.

**56.**<sup>1</sup> Nothing in this Act shall authorise the granting of a lease of any copyhold or customary hereditaments not warranted by the custom of the manor without the consent of the lord, nor otherwise prejudice or affect the rights of any lord of a manor.

<sup>1</sup> This is a *verbatim* re-enactment of sect. 43 of the Act of 1856.

#### APPLICATION OF ACT.

40 & 41  
Vict. c. 18,  
§ 57.

To what  
settle-  
ments this  
Act to  
extend.

**57.**<sup>1</sup> This Act shall, except as hereinafter provided, apply to all matters existing at the time of the passing of this Act, whether proceedings are actually pending or not, and any proceedings in any such matter may be continued or taken under this Act as if the matter originated under this Act, or may be continued or taken under the Acts hereby repealed, or

partly under this Act and partly under the said repealed Acts as occasion may require: Provided always, that the provisions in this Act contained respecting demises to be made without application to the Court shall extend only to settlements made after the first day of November, 1856.<sup>2</sup>

40 & 41  
Vict. c. 18,  
§ 57.

<sup>1</sup> Sect. 44 of the Act of 1856 was as follows:—  
“The provisions of this Act shall extend to all settlements whether made before or after it shall come in force, except those as to demises to be made without an application to the Court, which shall extend only to settlements made after this Act shall come in force.”

<sup>2</sup> See sect. 61, and note thereto.

REPEAL OF FORMER ACTS.

58. The Acts specified in the schedule to this Act are hereby repealed:<sup>1</sup> Provided always, that this repeal shall not affect anything done or any proceeding taken under any enactment hereby repealed.

40 & 41  
Vict. c. 18,  
§ 58.  
Repeal of  
Acts speci-  
fied in  
schedule.

<sup>1</sup> The following is the schedule referred to:—

SCHEDULE.

Session and Chapter.	Title or Short Title.
19 & 20 Vict c. 120	- An Act to facilitate leases and sales of Settled Estates.
21 & 22 Vict. c. 77	- An Act to amend and extend the Settled Estates Act of 1856.
27 & 28 Vict. c. 45	- An Act to further amend the Settled Estates Act of 1856.
37 & 38 Vict. c. 33	- The Leases and Sales of Settled Estates Amend-ment Act, 1874.
39 & 40 Vict. c. 30	- The Settled Estates Act, 1876.

SAVING—STATUTORY POWERS.

59.<sup>1</sup> Nothing in this Act shall interfere with the exercise of any powers to authorise or grant leases conferred by any Act of Parliament<sup>2</sup> not expressly repealed by this Act.

40 & 41  
Vict. c. 18,  
§ 59.  
Saving.

<sup>1</sup> This section is new.  
<sup>2</sup> See sect. 17 of 1 Will. IV., c. 65, p. 409, ante.



## EXTENT OF ACT.

40 & 41  
Vict. c. 18,  
**§ 60.**

**60.** This Act shall not extend to Scotland.<sup>1</sup>

<sup>1</sup> The repealed Acts did not extend to Scotland.

Extent of  
Act.

## COMMENCEMENT OF ACT.

40 & 41  
Vict. c. 18, 1877.<sup>1</sup>  
**§ 61.**

**61.** This Act shall commence on the first day of November,

<sup>1</sup> The Act of 1856 came into operation on the 1st of November, 1856.

Com-  
mence-  
ment of  
Act.

# THE SETTLED ESTATES ACT ORDERS, 1878.

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1. The words "settlement," "settled estates,"<sup>1</sup> and "the Court,"<sup>2</sup> in these Orders shall have the same interpretation as in the Act. S. E. A. Ord. I.
- The words "the Act" in these Orders shall mean the Settled Estates Act, 1877, "the petition" shall mean a petition under the Act, and "the judge" shall mean the judge of the court with whose name the petition shall be marked, or to whom the petition shall be transferred. Interpretation.

<sup>1</sup> See definition, s. 2 (a).

<sup>2</sup> See definition, s. 3 (b).

2. All petitions, notices, affidavits, and other proceedings under the Act shall be entitled "In the matter of the estates settled" [by the settlor or settlors, naming one of them and referring to the instrument by which the settlement shall have been created, and mentioning the parish or place and county in which the lands, messuages, or tenements proposed to be dealt with are situate], "and in the matter of the Settled Estates Act, 1877," and every such petition shall be marked with the words "In the High Court of Justice, Chancery Division," and with the title of the judge<sup>1</sup> before whom it is intended to be heard (see form No. 1 in the Appendix hereto). Upon the presentation of the petition, a day shall be appointed for hearing not less (unless the judge gives special leave) than eight clear days after such presentation, and in the computation of such eight clear days, Sundays and other days on which the offices are closed shall not be reckoned; and every petition shall, in the body thereof, or in a schedule thereto, or by a plan thereto annexed, contain a detailed description of the property proposed to be dealt with by such petition sufficient to identify the same. S. E. A. Ord. II. Title of petition, &c.

<sup>1</sup> See R. S. C. 1883, Ord. V., r. 9. The name of the judge is now added at the office of the registrars of the Chancery Division (c).

(a) P. 407, *ante*.  
(b) P. 410, *ante*.

(c) R. S. C. 1883, Ord. V. r. 9.

- S. E. A. 3. When a petition has been put into the paper for hearing, and by  
Ord. III.  
Petition standing over.
- reason of the parties not being ready, or for any other cause, the judge allows it to stand over generally, it may be put into the paper for a subsequent day, without any application to the Court or judge, on the petitioner or his solicitor applying for that purpose to the secretary of the Lord Chancellor or Master of the Rolls<sup>1</sup> (as the case may be), and notice of the appointment of such subsequent day shall be given by the petitioner, or his solicitor, two clear days before the day fixed to the other parties entitled to appear on such petition.

<sup>1</sup> This application is now made to the registrars of the Chancery Division (d).

- S. E. A. 4. The notice required to be given by the 26th section of the Act, if  
Ord. IV.  
Notices under sect. 26 of S. E. A. 1877.
- given before the hearing (or if given after the hearing, and the judge shall not otherwise direct), may, without any other direction of the Court, be given within the jurisdiction of the Court, except in the case of a person of unsound mind, not so found by inquisition, by delivering to the person to be served a notice (in the form No. 3 in the Appendix hereto) with such variations as circumstances require, and the time to be specified in such notice for the person served to deliver or leave a notification shall—(a.) in case the person to be served is a guardian of an infant, be such as shall be directed by the judge in the order appointing the guardian, and in case the person to be served is a married woman, or a committee of a lunatic, not less than twenty-eight clear days after the service; (b.) and in other cases not less than fourteen clear days after the service. In case the person to be served is of unsound mind, not so found by inquisition, or out of the jurisdiction of the Court, or it is desired to serve such notice on any person within the jurisdiction of the Court in any other manner than above provided, an application shall be made at chambers *ex parte* by the petitioner for directions as to the manner in which such notice shall be given, and as to the time to be specified in such notice within which the notification is to be made by the person served.

- S. E. A. 5. Where it is desired that any guardian of an infant shall make or  
Ord. V.  
Court may appoint guardian of infant.
- consent to any application to the Court under the Act, or make any notification respecting any application to the Court, or that notice may be given to any such guardian on behalf of an infant, the Court may appoint a guardian<sup>1</sup> to such infant for the purposes of the Act, and an application for such appointment may, after the petition is presented, be made at chambers by the petitioner by summons. And if an infant is the petitioner, the petition may be presented by the infant by his next friend,<sup>1</sup> and after the petition has been presented and answered, and a guardian appointed, the word "guardian" shall be substituted in the petition for the words "next friend," and the name of the guardian (if the next friend and guardian shall not be the same person) for the name of the next friend.

<sup>1</sup> Compare R. S. C. 1883, Ord. XVI., rr. 18—20, and Ord. LV., r. 25.

- S. E. A. 6. In the case of a lunatic<sup>1</sup> or infant tenant in tail by his committee or  
Ord. VI.  
guardian applying or consenting to an application, or giving a notifi-

(d) R. S. C. 1883, Ord. LXII., r. 18.

cation respecting an application, an application may be made at Infant or chambers by the petitioner after the petition is presented that such lunatic. committee or guardian may be directed to so apply or consent, or give a notification, and in the case of an infant such application may be combined with the application to appoint a guardian.

<sup>1</sup> Compare R. S. C. 1883, Ord. XVI., r. 17, and Ord. LV., r. 27.

7. In cases where the committees or guardians of lunatic or infant tenants in tail shall be served with notice of the application in pursuance of the 26th section of the Act, an application may be made at chambers by the petitioner, before the expiration of the time specified in such notice, that such committees or guardians may notify that they either assent to or dissent from such application, or submit their rights or interests, so far as they may be affected by such application, to be dealt with by the Court. S. E. A.  
Ord. VII.  

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Notices on  
infants, &c.
8. Upon an application to appoint a guardian to an infant for any such purpose as aforesaid, the summons shall be served upon the parent, testamentary guardian, or guardian appointed by the Court of Chancery or the Chancery Division of the High Court of Justice, of the infant, if there be any such parent or guardian, unless the Court or judge shall dispense therewith. S. E. A.  
Ord. VIII.  

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Service on  
parent.
9. Upon any application that a committee or guardian of a lunatic or infant tenant in tail may be directed to make or consent<sup>1</sup> to any application on behalf of such lunatic or infant, or to notify that the lunatic or infant assents to or dissents from such application, or submits his rights or interests, so far as they are affected by such application, to be dealt with by the Court, the summons shall be served on the committee of such lunatic, or the guardian appointed or proposed to be appointed of such infant, for such purpose. S. E. A.  
Ord. IX.  

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Service on  
guardian  
or com-  
mittee.
10. Upon an application to appoint<sup>1</sup> a guardian of an infant, the following facts shall be proved:— S. E. A.  
Ord. X.  

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Evidence  
to obtain  
appoint-  
ment of  
guardian.
  1. The age of the infant.
  2. Whether he has any parent, testamentary guardian, or guardian appointed by the Court of Chancery or the Chancery Division of the High Court of Justice, and, if so, whether such parent or guardian has any interest in the application, and, if he has, the nature of such interest, and whether or not adverse to the interest of the infant.
  3. Where and under whose care the infant is residing, and at whose expense he is maintained.
  4. In what way the proposed guardian is connected with the infant, and why proposed and how qualified to be appointed.
  5. That the proposed guardian has no interest in the application, or if he has, the nature of his interest, and that it is not adverse to the interest of the infant.
  6. The consent of the guardian to act.

<sup>1</sup> Compare R. S. C. 1883, Ord. LV., r. 26.

11. Upon an application that a committee of a lunatic tenant in tail may be directed to make or consent to any application, or to give any S. E. A.  
Ord. XI  

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Lunatics.  
Consent  
of lords  
justices.

notification respecting any application, the authority of the judge or judges entrusted with the care and commitment of the custody of the persons and estates of lunatics to such committee to act on behalf of the lunatic shall be produced, and if it shall appear thereby that such judge or judges are of opinion that it is proper and consistent with a due regard for the interest of the lunatic that the committee shall make or consent to the application, or give any specific notification respecting the application, such authority shall, unless the Court or judge shall for any special reason require further evidence, be sufficient evidence upon which the Court or judge may direct the committee to act in conformity with such authority.

S. E. A.  
Ord. XII.

Consent  
by infant.  
Evidence.

12. Upon an application that a guardian of an infant tenant in tail may be directed to make or consent to any application, or to give any notification respecting any application, evidence is to be produced to satisfy the judge that it is, and the guardian is to make an affidavit that he believes that it is, proper and consistent with a due regard for the interest of such infant that such direction shall be given.

S. E. A.  
Ord. XIII.

13. The examination of a married woman under sections 50 and 51 of the Act may be taken at any time after the petition is presented and answered.

S. E. A.  
Ord. XIV.

Examina-  
tion of  
married  
woman by  
commis-  
sioner.

14. When it is desired that a married woman resident within the jurisdiction of the Court shall be examined otherwise than by the Court, a solicitor who is a perpetual commissioner to take acknowledgments of deeds by married women may be appointed for that purpose by the judge at chambers in the Form No. 7 in the Appendix hereto without summons or order, upon the request of the petitioner and a certificate of the solicitor for the petitioner in the Form No. 7 in the Appendix hereto that the person to be appointed is not a solicitor for the petitioner, or for any party whose concurrence or consent to the application is required, but where an examination by such solicitor will cause unreasonable expense, delay, or inconvenience, or where the married woman is resident out of the jurisdiction of the Court, an application by summons may be made *ex parte* by the petitioner at chambers to appoint a solicitor if such woman is resident within the jurisdiction of the Court, and if not so resident a person, whether a solicitor or not, to take such examination.

S. E. A.  
Ord. XV.

Evidence  
on petition.

15. Upon every petition the Court shall be satisfied by sufficient evidence that it is proper and consistent with a due regard for the interests of all parties entitled under the settlement that the powers should be exercised; and it shall be stated in the affidavit why and upon what ground it is deemed to be so.

S. E. A.  
Ord. XVI.

Trustees.

16. Upon every petition where there are any trustees seized or possessed of any estate in trust for any of the persons whose consent or concurrence to or in the application is required, evidence is to be produced that notice of the application has been served on such trustees.

S. E. A.  
Ord.  
XVII.

Applica-  
tion to  
parlia-  
ment.

17. Upon every petition evidence shall be produced to satisfy the Court that neither the applicant nor any party entitled has previously applied to either House of Parliament for a Private Act to effect the same or a similar object, or if any such application has been made that the same was not rejected on its merits or reported against by the judges to whom the Bill may have been referred.

S. E. A.  
Ord.  
XVIII.

18. If upon the hearing of any petition the Court shall be of opinion that notice ought to be served on any person who shall not have been served, or that notice of the application ought to be inserted in any

newspaper, the Court shall give directions accordingly, and the Advertisement shall stand over generally or to such time as the Court shall direct.

19. When the Court shall at the hearing have directed notice of any application to be inserted in any newspapers, any person may, within the time specified in the notice, apply to the Court by motion, either *ex parte* or upon notice to the petitioner, for leave to be heard in opposition to or in support of the application, but if such motion shall be made *ex parte* and the Court shall think fit to give such leave, it shall be subject to such Order as the Court shall think fit to make as to costs. S. E. A.  
Ord. XIX.  
Leave to appear.
20. Any such person having obtained leave under the last preceding Order shall be at liberty, upon reasonable notice, to inspect and peruse the petition at the office of the solicitor for the petitioner, upon payment of a fee of 13s. 4d. on each inspection, and shall be entitled (either without or after such inspection) to be furnished with a copy of such petition upon such application, terms, and conditions as are provided by Rules 8, 9, 12, and 13 of Order V. of the Additional Rules of Court, under the Supreme Court of Judicature Act, 1875, dated 12th August, 1875. S. E. A.  
Ord. XX.  
Right to peruse petition.
21. Any Order made on an *ex parte* motion giving leave to such person to be heard on any application shall be served on the solicitor for the petitioner. S. E. A.  
Ord. XXI.
22. Any person served with a notice, pursuant to the 26th section of the Act, requiring him to notify whether he assents to or dissents from the application or submits his rights or interests so far as they may be affected by such application to be dealt with by the Court, and any trustee or other person served with notice pursuant to the 30th section of the Act, shall be at liberty, upon reasonable notice to the petitioner's solicitor, to inspect and peruse the petition without payment of any fee, and he shall be entitled to be furnished with a copy thereof upon such application, terms, and conditions as are provided by Rules 8, 9, 12, and 13 of Order V. of the Additional Rules of Court, under the Supreme Court of Judicature Act, 1875, dated 12th August, 1875. S. E. A.  
Ord.  
XXII.  
Person served with notice may peruse petition.
23. In all cases in which land in a register county or district is affected by the exercise of any powers conferred on the Court by the Act, and the Court shall direct notice to be recorded, pursuant to the 33rd section of the Act, such notice may be given by directing a memorial of the Order to be registered. And in all cases in which the Court shall not think it practicable or expedient that notice under the said section should be recorded as therein mentioned, the Order shall state that no record of the Order need be made. S. E. A.  
Ord.  
XXIII.  
Notice of order.
24. Every Order shall state, in addition to the names of the petitioners, the names of the persons other than the petitioners who concur or consent or to whom notice of the application has been given, or who (under Order 19) may have obtained leave to be heard in opposition to or in support of the application, and whether any notification was received from the persons to whom notice has been given, and if any has been received the purport thereof, and also the names of the persons, if any, notice to whom has been dispensed with, and whether the Order is made subject to any and what rights, estate, or interest of any person whose concurrence or consent has been refused, or who shall not or shall not be deemed to have submitted his rights or S. E. A.  
Ord.  
XXIV.  
Orders to specify parties.

interests to be dealt with by the Court, or whose rights or interests ought, in the opinion of the Court, to be excepted.

S. E. A. 25. In cases where the Court authorises a lease the Order shall direct  
Ord. that the lease shall contain such conditions as are required by the Act,  
XXV. and such other covenants, conditions, and stipulations as the Court  
shall deem expedient with reference to the special circumstances, or  
Order as may direct the same to contain such covenants, conditions, and stipu-  
to lease. lations as may be approved by the judge at chambers without directing  
the lease to be settled by the judge.

S. E. A. 26. The Rules 1, 2, 3 and 6 of Order LVII.<sup>1</sup> (as to time) in the Schedule  
Ord. to the Supreme Court of Judicature Act, 1875, shall be applicable to  
XXVI. these Orders, and to all proceedings under the Act.

<sup>1</sup> These rules are now superseded and extended by R. S. C., 1883, Ord. LXIV.,  
1, 2, 3, 4. Compare the substituted provision in R. S. C., 1883, Ord. LXIV.,  
Rr. 1—4.

S. E. A. 27. The forms set forth in the Appendix hereto shall be adhered to,  
Ord. subject only to such variations as may be necessary to meet the cir-  
XXVII. cumstances of the case or direction of the Court.

S. E. A. 28. In all cases not provided for by the Act, or these Orders, the exist-  
Ord. ing forms and mode of procedure and general practice of the Court on  
XXVIII. similar proceedings shall apply to proceedings under the Act.

S. E. A. 29. The fees and allowances to solicitors of the Court in respect to  
Ord. proceedings under the Act shall be such as are provided by Order VI.  
XXIX. of the Additional Rules of Court under the Supreme Court of Judi-  
cature Act, 1875, dated 12th August, 1875, and are applicable to such  
Fees to proceedings, and solicitors shall be entitled to charge and be allowed  
solicitors. for a request and certificate under the 14th Order (of these Orders),  
and for attendances at the judges' chambers to procure the appointment  
of an examiner thereon, a fee of 13s. 4d. if the lower scale of fees is  
applicable, and £1 1s. in other cases.

S. E. A. 30. The fees to be taken by the officers of the Court in respect to pro-  
Ord. ceedings under the Act shall be such as are provided by the Orders  
XXX. under the Supreme Court of Judicature Act, 1875, and are applicable  
Court fees. to such proceedings; and every request under the 14th Order (of these  
Orders) shall bear a stamp of 2s. if the lower scale of fees is applicable,  
and 3s. in other cases.

S. E. A. 31. Every petition under the Act shall set forth the name, address, and  
Ord. description of the petitioner, and also a place within three miles from  
XXXI. the site of Temple Bar, London,<sup>1</sup> where he may be served with any  
Address Order of the Court or of the judge in chambers, or notice relating to  
for service. the subject of such petition.

<sup>1</sup> Compare R. S. C., 1883, Ord. IV., r. 1.

S. E. A. 32. The judge in person sitting in Court or in chambers in the case of  
Ord. any petition may by special Order dispense with all or any of the  
XXXII. preceding Orders so far as they are applicable to such petition in any  
case in which he shall think fit, and upon such terms and conditions  
(if any) as he may deem proper.

S. E. A. 33. These Orders shall come into operation on the 7th day of January,  
Ord. 1879, and shall apply to any petition presented on or after that  
XXXIII. date.

S. E. A. 34. These Orders may be cited as "The Settled Estates Act Orders,  
Ord. 1878."  
XXXIV.



## APPENDIX TO SETTLED ESTATES ACT ORDERS, 1878.

## No. 1.

S. E. A.  
Form 1.

## FORM of TITLE of PETITION and other proceedings.

In the High Court of Justice,  
Chancery Division,  
*The Master of the Rolls*  
(or the Vice-Chancellor Malins,  
or other Vice-Chancellor).

In the Matter of Estates settled by A. B. (or A. B. and  
others) by will dated (or deed dated  
) consisting of certain lands (or  
messuages or tenements) in in the  
parish of in the county of .  
And in the Matter of the Settled Estates Act, 1877.

## No. 2.

S. E. A.  
Form 2.FORM of SUMMONS for directions as to service of notice pursuant to the 26th  
section of the Act.

(Title same as petition.)

Let all parties concerned attend at my Chambers at  
on , at o'clock, on the hearing of an application on  
the part of [the petitioners] that notice of the application  
intended to be made by a petition presented in the above matters on the  
day of requiring A. B. and C. D. severally to  
notify whether he assents to or dissents from such application, or submits his  
rights and interests so far as they may be affected by such application to be  
dealt with by the Court, may be given by [state the manner in which it is pro-  
posed to give the notice, and the time within which the notification is to be required]  
or in such other manner as the judge may think fit.

Dated this day of .  
This summons was taken out by of , solicitors  
for the applicant.

## No. 3.

S. E. A.  
Form 3.

## FORM of NOTICE pursuant to section 26 of the Act.

In the High Court of Justice,  
Chancery Division,  
*The Master of the Rolls*  
(or the Vice-Chancellor Malins,  
or other Vice-Chancellor).

(Title same as petition.)

Take notice that [name petitioners and their addresses as in petition] have pre-  
sented a petition in the above matters praying that [as in petition, but describing  
the lands, messuages, or tenements as in the petition], and it is intended to apply  
to the said Court for an order in accordance with such prayer, and you are  
[severally] hereby required to notify in writing within after  
the service hereof whether you assent to or dissent from such application, or  
submit your rights or interests so far as they may be affected by such applica-

H H



tion to be dealt with by the Court, such notification is to be delivered to the petitioners' solicitors, or left for them at the address specified at the foot hereof, and may be so delivered by transmitting the same to them by post at such address.

If no notification shall be so delivered or left within the time above limited you will be deemed to have submitted your rights and interests to be dealt with by the Court.

In the event of your dissenting from such application and desiring to be heard in opposition to the application you are by your notification to require notice to be given to or left for you or your solicitor at a place specified within three miles from the site of Temple Bar,<sup>1</sup> London, of the day on which the petition is fixed for hearing.

You or your solicitor can, upon reasonable notice to the under-named A. and B., inspect and peruse the petition without payment of any fee, and you are entitled at your own expense to have a copy of such petition furnished to you.

Dated the                      day of                      .

A. and B.

[Address within three miles of the site of Temple Bar,<sup>1</sup> London.]

Petitioners' Solicitors.

To [name the person or all persons to be served pursuant to the above section.]

NOTE.—A copy of the above notice, with a notification at the foot thereof to be filled up by you, is sent herewith.

<sup>1</sup> Compare R. S. C., 1883, Ord. IV. r. 1.

S. E. A.  
Form 4.

No. 4.

FORM to accompany NOTICE pursuant to section 26 of the Act.

*Copy Notice.*

In pursuance of a notice, of which the above is a copy, served on me on the                      day of                      , I hereby notify that I\*

Dated this                      day of                      .  
To Messrs.                      †.

\* Here insert "assent to the application," or "dissent from the application," or "submit my rights and interests so far as they may be affected by the application to be dealt with by the Court."

And if you dissent and desire to be heard in opposition thereto, add "And I desire to be heard in opposition to the application, and require notice to be given to                      at [naming a place within three miles of the site of Temple Bar,<sup>1</sup> London] of the day fixed for the hearing of the petition."

† Signature and address.

<sup>1</sup> Compare R. S. C., 1883, Ord. IV. r. 1.

S. E. A.  
Form 5.

No. 5.

FORM of SUMMONS for APPOINTMENT of a GUARDIAN of an INFANT, and for leave for the Guardian to make or consent to an Application.

(Title same as petition.)

Let all parties concerned attend at my Chambers at  
on                      , at                      o'clock, on the hearing of an application on the  
part of [the petitioners].

That *A. B.* or some other proper person may be appointed guardian of *C. D.*, an infant, and that *E. F.* or some other proper person may be appointed guardian of *G. H.*, an infant, for the purpose of making on behalf of such infants (or consenting on behalf of such infants to) an application proposed to be made by a petition presented on the                      day of                      , by the above-named applicants for an Order in accordance with the prayer of such petition, and (in case the infants are tenants-in tail) that such guardians may be directed to make (or consent to) such application.

Dated this

This summons was taken out by                      of                      , solicitors for the applicants.

No. 6.

S. E. A.  
Form 6.

FORM of SUMMONS for APPOINTMENT of a GUARDIAN of an INFANT to be served with Notice of an Application, and for leave for the Guardian to deliver a notification pursuant to such notice.

*(Title same as petition.)*

Let all parties concerned attend at my Chambers at  
on                      , at                      o'clock, on the hearing of an application on the part of [the petitioners].

That *A. B.* or some other proper person may be appointed guardian of *C. D.*, an infant, and that *E. F.* or some other proper person may be appointed guardian of *G. H.*, an infant, for the purpose of being served with a notice requiring them on behalf of such infants, within                      clear days after service thereof, to notify whether they assent to or dissent from an application proposed to be made by a petition presented on the                      day of                      by the above-named applicants for an Order in accordance with the prayer of such petition, or submit the infants' rights or interests so far as they may be affected by such application to be dealt with by the Court, and (in case the infants are tenants-in-tail) that such guardians may be directed to notify that they, on behalf of such infants, assent to (or dissent from) such application (or submit the infants' rights or interests, so far as they may be affected by such application to be dealt with by the Court).

Dated this                      day of                      .

This summons was taken out by                      of                      , solicitors for the applicants.

No. 7.

S. E. A.  
Form 7.

FORM of REQUEST to appoint a person to examine a Married Woman.

*(Title as same as petition.)*

The petitioners                      , in a petition presented in these matters on the                      day of                      , request that *A. B.* of, &c. [*C. D.* of, &c., and *E. F.* of, &c.], being a solicitor [or solicitors], and a perpetual commissioner [or perpetual commissioners] to take the acknowledgment of deeds by married women, may be appointed for the purpose of any or either of them examining the petitioners *G.* the wife of *H. I.*, and *K.* the wife of *L. M.*, and *N.* the wife of *O. P.*, of, &c., respectively touching their knowledge of the nature and effect of the application intended to be made by the petition, and to ascertain whether they the said *G. I.* and *K. M.* respectively freely desire to make such application, and whether she the said *N. P.* freely desires to consent to such application.

Name  
such as  
may be re-  
quired to  
examine  
all the  
married  
women  
who are to  
be ex-  
amined.

We, the solicitors for the petitioners, hereby certify that neither of them,

the said *A. B.*, *C. D.*, and *E. F.* is the solicitor for the petitioner, or for any party whose concurrence or consent to the application is required.

Dated this            day of

**A. and B., solicitors for the petitioners.**  
**Address.**

*The Master of the Rolls [or the Vice-Chancellor]* appoints the  
said \_\_\_\_\_ for the purposes mentioned in the above request.

***E. P.,***

**Chief Clerk**

**S. E. A.  
Form 8.**

No. 8.

### FORM of SUMMONS to appoint persons to examine Married Women.

Let all parties concerned attend at my Chambers at \_\_\_\_\_ on \_\_\_\_\_, at \_\_\_\_\_ o'clock, on the hearing of an application on the part of \_\_\_\_\_, the petitioners in a petition presented in this matter on the \_\_\_\_\_ day of \_\_\_\_\_, that A. B. of, &c., and C. D. of, &c. [*and if the married women are within the jurisdiction, add* being solicitors] be appointed for the purpose of any or either of them examining the petitioners G. the wife of H. I, and K. the wife of L. M., and N. the wife of O. P., of, &c., respectively touching their knowledge of the nature and effect of the application intended to be made by the said petition, and to ascertain whether they the said G. I. and K. M. freely desire to make such application, and whether she the said N. P. freely desires to consent to such application.

Dated this            day of

This summons was taken out by \_\_\_\_\_, of \_\_\_\_\_, solicitors for the applicant.

**S. E. A.  
Form 9.**

**No. 9.**

**FORM of EXAMINATION of a MARRIED WOMAN making or assenting to an Application.**

*(Title same as petition).*

\*Insert the names of all who can be conveniently examined by the same person and at the same time.

The examination of the petitioner *G.* the wife of *H. I.*, and *K.* the wife of *L. M.*, and of *N.* the wife of *O. P.* of\*

We, the said *G. I.*, *K. M.* and *N. P.*, having been this day respectively examined apart from our respective husbands touching our knowledge of the nature and effect of an application intended to be made to the High Court of Justice by a petition presented in this matter on the                      day of                      by us the said *G. I.* and *K. M.* and others, for answer thereto severally say that we are aware of the nature and effect of the said intended application, and we the said *G. I.* and *K. M.* severally freely desire to make such application, and I, the said *N. P.*, freely desire to consent to such application. As witness our hands this                      day of                      .

Witness to the signature of the  
said *G. I., K. M., and N. P.*  
*Q. R.,* address.

**[To be at the foot of the above Examination.]**

**S. E. A.**  
**Form 10.**

**No. 10.**

**FORM of CERTIFICATE of EXAMINATION of MARRIED WOMEN making or  
assenting to an Application.**

**I, the undersigned A. B., being the person appointed by the *Master of the Rolls or the Vice-Chancellor* for the purpose of examining the**

above-named *G.* the wife of *H. I.*, *K.* the wife of *L. M.*, and *N.* the wife of *O. P.*, hereby certify that I have this            day of            examined the said *G. I.*, *K. M.*, and *N. P.* apart from their respective husbands touching their knowledge of the nature and effect of the application intended to be made by the petition above referred to, and I have taken such examination in writing as above set forth, and I further certify that at the time of such examination I explained to them the nature and effect of the said application, and I am satisfied that they were aware of the nature and effect of such application, and that they the said *G. I.* and *K. M.* freely desire to make the said application, and that the said *N. P.* freely desires to consent to the said application.

No. 11.

FORM of AFFIDAVIT verifying Examination.

S. E. A.  
Form 11.

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(*Title as in petition*).

I, *Q. R.* of            , make oath and say that I was present and did see *G. J.*, *K. M.*, and *N. P.* respectively named in the above petition, sign the examination or paper writing annexed hereto and now produced and shown to me marked A, and that the signatures *G. I.*, *K. M.*, and *N. P.* attached thereto are respectively the proper handwritings of *G.* the wife of *H. I.* of            , *K.* the wife of *L. M.* of            , and *N.* the wife of *O. P.* of            . And I further say that I was present and did see *A. B.* sign the certificate or paper writing annexed hereto and now produced and shown to me marked B, and that the signature *A. B.* attached thereto is the proper handwriting of *A. B.* of, &c. And I say that the signature *Q. R.* attached to the said paper writings as a witness is my handwriting.

No. 12.

FORM of NOTICE pursuant to the 30th section of the Act.

S. E. A.  
Form 12.

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(*Title same as petition*).

In the High Court of Justice,  
Chancery Division,  
*Master of the Rolls*  
[or the Vice-Chancellor Malins,  
or other Vice-Chancellor].

Take notice that [*name petitioners and their addresses as in petition*] have presented a petition in the above matters praying that [*as in petition, but describing the lands, messuages, or tenements, as in the petition*], and it is intended to apply to the said Court for an Order in accordance with such prayer. This notice is given to you in pursuance of the above Act because you are seized or possessed of an estate in trust for            , whose consent or concurrence to or in the application is required by the Act. You or your solicitors can upon reasonable notice to the under-named *A.* and *B.* inspect and peruse the petition at the address specified at the foot hereof without payment of any fee, and you are entitled at your expense to have a copy of such petition furnished to you.

Dated this            day of            .

*A. and B.*

*Address,*

Solicitors for the petitioners.

To [*name the persons to be served pursuant to the above section*].

S. E. A.  
Form 13.

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No. 13.

FORM of NOTICE to be inserted in newspapers if directed pursuant to the  
31st section.

*(Title as in petition).*

By direction of the *Master of the Rolls (or the Vice-Chancellor* ),  
notice is hereby given that an application by petition has been made to the  
Court of the said judge for a sale or for powers to grant leases of the above-  
mentioned hereditaments (or otherwise according to the circumstances), and  
the Court has directed the application to be adjourned (or adjourned till ),  
and any person whether interested in the estate or not, may on or before  
apply to the said Court by motion for leave to be heard in opposition to or in  
support of such application. The petition may be inspected on application to  
Messrs. A. and B. of , the solicitors for the petitioners.

# THE SETTLED LAND ACT, 1882,

AS AMENDED BY

# THE SETTLED LAND ACT, 1884.

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45 & 46 VICT. C. 38.

47 & 48 VICT. C. 18.

*An Act for facilitating Sales, Leases, and other dispositions  
of Settled Land, and for promoting the execution of  
Improvements thereon.*

Be it enacted, &c.

## I.—PRELIMINARY.

1.—(1.) This Act may be cited as the Settled Land Act, 1882. 45 & 46  
Vict. c. 38,

(2.) This Act, except where it is otherwise expressed, shall § 1.  
commence and take effect from and immediately after the Short  
title ;  
commence-  
ment ;  
thirty-first day of December one thousand eight hundred and  
eighty-two, which time is in this Act referred to as the com-  
mencement of this Act.

(3.) This Act does not extend to Scotland.<sup>1</sup>

Extent.

<sup>1</sup> Section 30 practically adds to s. 9 of the Improvement of Land Act, 1864 (a), which *does* apply to Scotland, the list of improvements contained in s. 25 of this Act.

This Act was amended by the S. L. A. 1884 (b), which was passed on the 3rd of July, 1884. Sections 1, 2, and 3 of the S. L. A. 1884, are as follows:—

[1. This Act may be cited as the Settled Land Act, 1884.]

(a) 27 & 28 Vict. c. 114.

(b) 47 & 48 Vict. c. 18.

47 & 48  
Vict. c. 18,

§ 1.

Short title.

47 & 48  
Vict. c. 18,  
§ 2.

Interpre-  
tation.

47 & 48  
Vict. c. 18,  
§ 3.

Construc-  
tion of  
Act.

[2. The expression "the Act of 1882" used in this Act means the Settled Land Act, 1882.]

[3. The Act of 1882 and this Act are to be read and construed together as one Act, and expressions used in this Act are to have the same meanings as those attached by the Act of 1882 to similar expressions used therein.]

## II.—DEFINITIONS.

45 & 46  
Vict. c. 38,  
§ 2.

Definition  
of settle-  
ment.

2.—(1.) Any deed, will, agreement for a settlement, or other agreement, covenant to surrender, copy of Court roll, Act of Parliament, or other instrument, or any number of instruments, whether made or passed before or after, or partly before and partly after, the commencement of this Act,<sup>1</sup> under or by virtue of which instrument or instruments any land, or any estate or interest in land, stands for the time being limited to or in trust for any persons by way of succession, creates or is for the purposes of this Act a settlement, and is in this Act referred to as a settlement, or as the settlement, as the case requires.<sup>2</sup>

(2.) An estate or interest in remainder or reversion not disposed of by a settlement, and reverting to the settlor or descending to the testator's heir, is for purposes of this Act an estate or interest coming to the settlor or heir under or by virtue of the settlement, and comprised in the subject of of the settlement.<sup>3</sup>

Settled  
land.

(3.) Land, and any estate or interest therein, which is the subject of a settlement, is for the purposes of this Act settled land, and is, in relation to the settlement, referred to in this Act as the settled land.<sup>4</sup>

(4.) The determination of the question whether land is settled land, for purposes of this Act, or not, is governed by the state of facts, and the limitations of the settlement, at the time of the settlement taking effect.<sup>5</sup>

Tenant for  
life.

(5.) The person who is for the time being, under a settlement, beneficially entitled to possession of settled land, for his

life, is for purposes of this Act the tenant for life of that land, and the tenant for life under that settlement.<sup>6</sup>

45 & 46  
Vict. c. 38,  
§ 2.

(6.) If, in any case, there are two or more persons so entitled as tenants in common, or as joint tenants, or for other concurrent estates or interests, they together constitute the tenant for life for purposes of this Act.

Concur-  
rent life  
interests.

(7.) A person being tenant for life within the foregoing definitions shall be deemed to be such notwithstanding that, under the settlement or otherwise, the settled land, or his estate or interest therein, is incumbered or charged in any manner or to any extent.

Incum-  
brances.

(8.) The persons, if any, who are for the time being, under a settlement, trustees with power of sale<sup>7</sup> of settled land, or with power of consent to or approval of the exercise of such a power of sale, or if under a settlement there are no such trustees, then the persons, if any, for the time being, who are by the settlement declared to be trustees thereof for purposes of this Act, are for purposes of this Act trustees of the settlement.

Trustees of  
the settle-  
ment.

(9.) Capital money arising under this Act, and receivable for the trusts and purposes of the settlement, is in this Act referred to as capital money arising under this Act.

Capital  
money.

(10.) In this Act—

(i.) Land includes incorporeal hereditaments, also an undivided share in land; income includes rents and profits; and possession includes receipt of income:

Land, &c.

(ii.) Rent includes yearly or other rent, and toll, duty, royalty, or other reservation, by the acre, or the ton, or otherwise; and, in relation to rent, payment includes delivery; and fine includes premium or fore-gift, and any payment, consideration, or benefit in the nature of a fine, premium, or fore-gift:

Rent.

(iii.) Building purposes include the erecting and the improving of, and the adding to, and the repairing of buildings; and a building lease is a lease for any building purposes or purposes connected therewith:

Building.

(iv.) Mines and minerals mean mines and minerals whether

Mines and  
minerals.



45 & 46  
Vict. c. 38,  
§ 2.

already opened or in work or not, and include all minerals and substances in, on, or under the land, obtainable by underground or by surface working; and mining purposes include the sinking and searching for, winning, working, getting, making merchantable, smelting or otherwise converting or working for the purposes of any manufacture, carrying away, and disposing of mines and minerals, in or under the settled land, or any other land, and the erection of buildings, and the execution of engineering and other works, suitable for those purposes; and a mining lease is a lease for any mining purposes or purposes connected therewith, and includes a grant or licence for any mining purposes:<sup>8</sup>

- Manor. (v.) Manor includes lordship, and reputed manor or lordship:  
Steward. (vi.) Steward includes deputy steward, or other proper officer, of a manor:  
Will. (vii.) Will includes codicil and other testamentary instrument, and a writing in the nature of a will:  
Securities. (viii.) Securities include stocks, funds, and shares:  
Court. (ix.) Her Majesty's High Court of Justice is referred to as the Court:  
Land commissioners. (x.) The Land Commissioners for England as constituted by this Act are referred to as the Land Commissioners:<sup>9</sup>  
Person. (xi.) Person includes corporation.

<sup>1</sup> 31st December, 1882.

<sup>2</sup> Compare the first clause of s. 2 of the S. E. A. 1867 (c).

Settle- Where land was, by settlement, vested in trustees in trust for a wife  
ment. for life, and subject thereto upon trusts under which it had been appointed to a daughter, who had settled her reversionary fee simple PEARSON, J., on petition by the wife, held that the original settlement was "the settlement" under the S. L. A., and that the Court, in appointing trustees, had nothing to do with the derivative settlement (d).

A sale of the reversion does not affect the question whether land is "settled land" or not (e).

<sup>3</sup> Compare the third clause of s. 2 of the S. E. A. 1877.

(c) P. 407, *ante*.

(d) *Re Knowles*, 28 S. J. 738. Compare *Re Earl v. Webster*, 24 Ch. D. 144.

(c) *Wheclwright v. Walker*, 23 Ch. D. 752.

<sup>4</sup> Compare this sub-section and the definition of land in sub-section 10 (i.) with the second clause of s. 2 of the S. E. A. 1867. See notes to s. 1 of the V. and P. Act (*f*), and to s. 2 (2) of the C. A. 1881 (*g*). 45 & 46  
Vict. c. 38,  
§ 2.

Where a deceased intestate partner's share in partnership land had been retained by his administrator, it was held to be "settled land" (*h*). Settled  
land.

<sup>5</sup> See note 5 to s. 2 of the S. E. A. 1877 (*i*).

<sup>6</sup> See the provisions of s. 58, p. 525, *post*, as to other persons who are to have the powers of a tenant for life. As to tenants for life under disability, see ss. 59 to 62.

Land was devised to trustees for a term upon trusts for raising two large sums and, subject thereto, to the same trustees during the life of X. upon trusts for management, and after payment of expenses and outgoings, for payment of the balance of the income to X., with remainder to the children of X. in tail. X. was held to be a tenant for life within the S. L. A. (*k*). Tenant for  
life.

<sup>7</sup> Where there are no trustees with a present power of sale, it is necessary to obtain the appointment, under s. 38, of trustees for the purposes of the Act. A tenant for life will, in such case, be restrained from selling until an appointment has been made (*l*). Trustees.

<sup>8</sup> Compare the definition of "mining lease" in s. 2 of the C. A. 1881, p. 211, *ante*.

<sup>9</sup> The Land Commissioners for England (*m*), as constituted by this Act, are the bodies formerly known as the Inclosure Commissioners for England and Wales, the Copyhold Commissioners, and the Tithe Commissioners for England and Wales. Land com-  
missioners.

### III.—SALE ; ENFRANCHISEMENT ; EXCHANGE ; PARTITION.

#### GENERAL POWERS AND REGULATIONS.

#### 3. A tenant for life<sup>1</sup>—

(i.) May sell<sup>2</sup> the settled land, or any part thereof, or any easement, right, or privilege of any kind over or in relation to the same ; and

(ii.) Where the settlement comprises a manor<sup>3</sup>—may sell<sup>4</sup> the seignory of any freehold land<sup>3</sup> within the manor, or the freehold and inheritance of any copyhold or customary land, parcel of the manor, with or without

45 & 46  
Vict. c. 38,  
§ 3.

Powers to  
tenant for  
life to sell,  
&c.

(*f*) P. 158, *ante*.

(*g*) P. 210, *ante*.

(*h*) *Re Wells*, 31 W. R. 764.

(*i*) P. 409, *ante*.

(*k*) *Re Jones*, 26 Ch. D. 736.

(*l*) *Wheelwright v. Walker*, 23 Ch. D. 752.

(*m*) Sec. 48 (1), p. 516, *post*.

45 & 46  
Vict. c. 38,  
§ 3.

---

any exception or reservation of all or any mines or minerals,<sup>3</sup> or of any rights or powers relative to mining purposes,<sup>3</sup> so as in every such case to effect an enfranchisement;<sup>4</sup> and

To ex-  
change.

(iii.) May make an exchange<sup>4</sup> of the settled land, or any part thereof, for other land, including an exchange in consideration of money paid for equality of exchange; and

To par-  
tition.

(iv.) Where the settlement comprises an undivided share<sup>5</sup> in land, or, under the settlement, the settled land has come to be held in undivided shares—may concur in making partition<sup>4</sup> of the entirety, including a partition in consideration of money paid for equality of partition.

Powers of  
tenant for  
life.

<sup>1</sup> “The purport and object of the Act is to grant to a tenant for life very large powers for his own benefit, and I desire to construe the Act in that spirit.” *Per* PEARSON, J. (m).

There is no distinction between *actual* tenants for life and *quasi* tenants for life. “It is sufficient, in order to exercise the powers of a tenant for life, to be entitled to income, whether in actual receipt of income or not.” *Per* BACON, V.-C. (n).

As to persons who are authorized to exercise the powers of a tenant for life see s. 58 and notes thereto (o).

The Act “prohibits the trustees or anybody else interfering with or trying to fetter or contract the power which in the eye of the law a tenant for life ought to have of selling the estate of which he is only tenant for life.” \* \* \* It is his “right to derive any benefit he can from his tenancy for life, and if he is satisfied that he will derive a larger benefit from the sale of the estate than from its enjoyment in its present condition, he has a right to have it sold.” \* \* \* “That is what is inseparable from his character of tenant for life.” *Per* BACON, V.-C. (p).

“I find nothing whatever in the Act which gives any person entitled in remainder any power of any sort or description to interfere with the sale by a tenant for life. In fact, as far as I can see, the object of this Act is to enable a tenant for life to take out of settlement properties put into settlement, and to substitute for real estate comprised in the settle-

(m) *Re Newcastle*, 24 Ch. D. 137.

(n) *Re Jones*, 24 Ch. D. 586; affirmed on appeal, 32 W. R. 735.

(o) P. 525, *post*.

(p) *Thomas v. Williams*, 24 Ch. D. 566.

ment, *ex mero motu*, the value of that in pounds, shillings and pence." 45 & 46  
Per PEARSON, J. (q). Vict. c. 38,

§ 3.

Therefore trustees with a power of sale at the request of the tenant for life will not be restrained from selling, at his request, on the evidence of a remainderman, who sets up a case of a speculative increase in value in consequence of a contemplated railway, and the possible future development of coal mines (r). Opposition by remainderman.

The Act may be the means of a great abuse where a tenant for life extorts a fancy price for the settled land from remaindermen anxious to keep it in their family. See *re Marlborough* (s).

As to the effect of this section together with ss. 56 and 63, and ss. 6 and 7 of the S. L. A., 1884, in giving to a tenant for life power to control the discretion of trustees, see s. 56, and notes thereto (t).

An order for sale under the S. E. A., 1877, will prevent a tenant for life from selling under this Act; and, although the Court would stay proceedings under the order under special circumstances, it will not do so, merely because a sale out of Court under the S. L. A. would be cheaper (u).

<sup>2</sup> "The principal mansion house on any settled land, and the demesnes thereof, and other lands usually occupied therewith," cannot be sold or leased by the tenant for life, "without the consent of the trustees of the settlement, or an order of the Court." See s. 15 (x). Mansion excepted.

<sup>3</sup> See the definition of "land" in s. 2, sub-s. 10 (i.) (y), "manor" in s. 2, sub-s. 10 (v.) (z), and "mines and minerals" and "mining purposes" in s. 2, sub-s. 10 (iv.) (a).

<sup>4</sup> A tenant for life has not only express powers of sale, exchange and enfranchisement, but also an express power of partition, so that the question whether a power of sale and exchange authorizes a partition is no longer a difficulty. See Dart, V. & P. (5th ed.), 78.

<sup>6</sup> As to the raising of money for enfranchisement, or equality of exchange, or partition, see s. 18 (b). See also s. 19, and notes thereto (c).

4.—(1.) Every sale shall be made at the best price that can reasonably be obtained.<sup>1</sup> 45 & 46  
Vict. c. 38,

§ 4.

(2.) Every exchange and every partition shall be made for the best consideration in land or in land and money that can reasonably be obtained. Regulations respecting sale, en-

(q) *Wheelwright v. Walker*, 31 W. R. 364.

(r) *Thomas v. Williams*, 24 Ch. D. 558.

(s) 28 S. J. 764.

(t) P. 522, *post*.

(u) *Re Barrs-Haden*, 32 W. R. 194.

(x) P. 486, *post*.

(y) P. 473, *ante*.

(z) P. 474, *ante*.

(a) P. 473, *ante*.

(b) P. 488, *post*.

(c) P. 489, *post*.

45 & 46  
Vict. c. 38,  
§ 4.

franchise-  
ment,  
exchange,  
and par-  
tition.

(3.) A sale may be made in one lot or in several lots, and either by auction or by private contract.<sup>2</sup>

(4.) On a sale the tenant for life may fix reserve biddings and buy in at an auction.

(5.) A sale, exchange, or partition may be made subject to any stipulations respecting title, or evidence of title, or other things.

(6.) On a sale, exchange, or partition, any restriction or reservation with respect to building on or other user of land,<sup>3</sup> or with respect to mines and minerals,<sup>3</sup> or with respect to or for the purpose of the more beneficial working thereof, or with respect to any other thing, may be imposed or reserved and made binding, as far as the law permits, by covenant, condition, or otherwise, on the tenant for life and the settled land, or any part thereof, or on the other party and any land sold or given in exchange or on partition to him.

(7.) An enfranchisement may be made with or without a re-grant of any right of common or other right, easement, or privilege theretofore appendant or appurtenant to or held or enjoyed with the land enfranchised, or reputed so to be.

(8.) Settled land in England shall not be given in exchange for land out of England.<sup>4</sup>

Compare this and the previous section with ss. 16 and 19 of the S. E. A., 1877 (*d*).

<sup>1</sup> Under s. 53 a tenant for life is a trustee for remaindermen; and in order to render valid a sale, exchange or partition, as between tenant for life and remaindermen, the conditions prescribed by sub-ss. 1, 2, and 8, must be strictly complied with. But a purchaser in good faith from a tenant for life is protected by s. 54, p. 521, *post*.

<sup>2</sup> The Court may authorise trustees selling on behalf of an infant under s. 60 to sell out of Court (*e*).

<sup>3</sup> For definition of "land," see s. 2, sub-s. 10 (i.) (*f*), and "mines and minerals," see s. 2, sub-s. 10 (iv.) (*g*).

<sup>4</sup> Compare s. 23 (*h*).

(*d*) Pp. 419, 422, *ante*.

(*e*) *Re Price; Leighton v. Price*, 32 W. R. 1009.

(*f*) P. 473, *ante*.

(*g*) P. 473, *ante*.

(*h*) P. 495, *post*.

## SPECIAL POWERS.

5. Where on a sale, exchange, or partition there is an incumbrance affecting land sold or given in exchange or on partition, the tenant for life, with the consent of the incumbrancer, may charge that incumbrance on any other part of the settled land, whether already charged therewith or not, in exoneration of the part sold or so given, and, by conveyance of the fee simple, or other estate or interest the subject of the settlement, or by creation of a term of years in the settled land, or otherwise, make provision accordingly.

45 & 46  
Vict. c. 38,  
§ 5.

Transfer  
of incum-  
brances on  
land sold,  
&c.

See s. 24 (5), p. 496, *post*.

## IV.—LEASES.—GENERAL POWERS AND REGULATIONS.

6. A tenant for life may lease<sup>1</sup> the settled land, or any part thereof, or any easement, right or privilege of any kind, over or in relation to the same, for any purpose whatever, whether involving waste or not, for any term not exceeding—

45 & 46  
Vict. c. 38,  
§ 6.

Power for  
tenant for  
life to  
lease for  
ordinary  
or building  
or mining  
purposes.

(i.) In case of a building lease,<sup>2</sup> ninety-nine years:

(ii.) In case of a mining lease,<sup>3</sup> sixty years:

(iii.) In case of any other lease, twenty-one years.

<sup>1</sup> See the provisions contained in s. 10 (i) as to the variation of building or mining leases according to the circumstances of the district.

Formerly, a tenant for life with powers of sale and leasing, could sell or lease to a trustee for himself (j). But, now, inasmuch as, under s. 53, he is a trustee for all parties entitled under the settlement, he cannot directly or indirectly sell or lease to himself, at any rate without the sanction of the Court.

<sup>2</sup> For the definition of "building-lease," see s. 2, sub-s. 10 (iii.) (k). This definition apparently includes a repairing-lease. See, also, note 5 to s. 18 of C. A. 1881 (l).

<sup>3</sup> For the definition of "mining-lease," see s. 2, sub-s. 10 (iv.) (m).

(i) P. 482, *post*.

(k) P. 473, *ante*.

(j) Dart, V. & P. (5th ed.) 37;  
*Wilson v. Sewell*, 4 Burr. 1979; Sugd.  
Pow. 7th ed.; App. p. 551.

(l) P. 248, *ante*.

(m) P. 473, *ante*.

45 & 46  
Vict. c. 38,  
§ 7.

Regula-  
tions res-  
pecting  
leases  
generally.  
By deed.  
Best rent.  
Covenants.

7.—(1.) Every lease shall be by deed, and be made to take effect in possession not later than twelve months after its date.<sup>1</sup>

(2.) Every lease shall reserve the best rent<sup>2</sup> that can reasonably be obtained, regard being had to any fine taken, and to any money laid out or to be laid out for the benefit of the settled land, and generally to the circumstances of the case.

(3.) Every lease shall contain a covenant by the lessee for payment of the rent, and a condition of re-entry on the rent not being paid within a time therein specified not exceeding thirty days.

Counter-  
part.

(4.) A counterpart of every lease shall be executed by the lessee and delivered to the tenant for life; of which execution and delivery the execution of the lease by the tenant for life shall be sufficient evidence.<sup>3</sup>

Protection  
of lessee.

(5.) A statement, contained in a lease or in an indorsement thereon, signed by the tenant for life, respecting any matter of fact or of calculation under this Act in relation to the lease, shall, in favour of the lessee and of those claiming under him, be sufficient evidence of the matter stated.<sup>4</sup>

S. 4 of the S. L. A. 1844, is as follows :—

47 & 48  
Vict. c. 18,  
§ 4.

Fine on a  
lease to be  
capital  
money.

[4. A fine received on the grant of a lease under any power conferred by the Act of 1882 is to be deemed capital money arising under that Act.]

<sup>1</sup> The provisions of this section, and s. 6, may be usefully compared with s. 4 of the S. E. A. 1877, under which leases may be authorised by the Court, and with s. 46, of the same Act (*n*), which authorises tenants for life to grant leases as to land in England for twenty-one years, and as to land in Ireland for thirty-five years.

<sup>2</sup> See *Re Rawlins* (*o*).

<sup>3</sup> Compare s. 48 of the S. E. A. 1877, p. 450, *ante*.

<sup>4</sup> Compare s. 54 of this Act, p. 521, *post*.

As to the effect upon powers of leasing under this Act and the S. E. A. 1877, of an assignment of a life estate, see s. 50 (*p*).

(*n*) P. 448, *ante*.

(*o*) L. R. 1 Eq. 286.

(*p*) P. 518, *post*.

BUILDING LEASES.<sup>1</sup>

8.—(1.) Every building lease shall be made partly in consideration of the lessee, or some person by whose direction the lease is granted, or some other person, having erected, or agreeing to erect, buildings, new or additional, or having improved or repaired, or agreeing to improve or repair buildings, or having executed, or agreeing to execute, on the land leased, an improvement authorised by this Act, for or in connection with building purposes.

45 & 46  
Vict. c. 38,  
§ 8.

Regulations respecting building leases.

Consideration.

Peppercorn rent.

(2.) A peppercorn rent or a nominal or other rent less than the rent ultimately payable, may be made payable for the first five years or any less part of the term.

(3.) Where the land is contracted to be leased in lots, the entire amount of rent to be ultimately payable may be apportioned among the lots in any manner; save that—

Apportionment of rent on leases in lots.

(i.) The annual rent reserved by any lease shall not be less than ten shillings; and

(ii.) The total amount of the rents reserved on all leases for the time being granted shall not be less than the total amount of the rents which, in order that the leases may be in conformity with this Act, ought to be reserved in respect of the whole land for the time being leased; and

(iii.) The rent reserved by any lease shall not exceed one-fifth part of the full annual value of the land comprised in that lease with the buildings thereon when completed.

<sup>1</sup> For definition of "building-lease" see s. 2, sub-s. 10 (iii.) (q). And for the provisions as to the variation of building-leases according to the circumstances of the district, see s. 10 (r).

## MINING LEASES.

9.—(1.) In a mining lease<sup>1</sup>—

(i.) The rent may be made to be ascertainable by or to vary according to the acreage worked, or by or

45 & 46  
Vict. c. 38,  
§ 9.

Regulations respecting

(q) P. 473, *ante*.

(r) P. 482, *post*.



45 & 46  
Vict. c. 38,  
**§ 9.**

pecting  
mining  
leases.

Royalty.  
Fixed rent.

according to the quantities of any mineral or substance gotten, made merchantable, converted, carried away, or disposed of, in or from the settled land, or any other land, or by or according to any facilities given in that behalf; and

- (ii.) A fixed or minimum rent may be made payable, with or without power for the lessee, in case the rent according to acreage or quantity, in any specified period does not produce an amount equal to the fixed or minimum rent, to make up the deficiency in any subsequent specified period, free of rent other than the fixed or minimum rent.

Improve-  
ments.

- (2.) A lease may be made partly in consideration of the lessee having executed, or his agreeing to execute, on the land leased, an improvement authorised by this Act, for or in connection with mining purposes.

<sup>1</sup> For the definition of "mining-lease" and "mining-purposes," see s. 2, sub-s. 10 (iv.) (s). And, for the provisions as to the variation of mining-leases according to the circumstances of the district, see s. 10.

#### LONG BUILDING AND MINING LEASES.

45 & 46  
Vict. c. 38,  
**§ 10.**

Variation  
of building  
or mining  
leases  
according  
to custom  
of district.

**10.**—(1.) Where it is shown to the Court<sup>1</sup> with respect to the district in which any settled land is situate, either—

- (i.) That it is the custom for land therein to be leased or granted for building or mining purposes for a longer term or on other conditions than the term or conditions specified in that behalf in this Act,<sup>1</sup> or in perpetuity; or
- (ii.) That it is difficult to make leases or grants for building or mining purposes of land therein, except for a longer term or on other conditions than the term and conditions specified in that behalf in this Act, or except in perpetuity;

the Court may,<sup>2</sup> if it thinks fit, authorise generally the tenant for life to make from time to time leases or grants of or affecting the settled land in that district, or parts thereof, for any term or in perpetuity, at fee-farm or other rents, secured

(s) P. 473, *ante*.

by condition of re-entry, or otherwise, as in the order of the Court expressed, or may,<sup>2</sup> if it thinks fit, authorise the tenant for life to make any such lease or grant in any particular case.

45 & 46  
Vict. c. 38,  
§ 10.

(2.) Thereupon the tenant for life, and, subject to any direction in the order of the Court to the contrary, each of his successors in title being a tenant for life, or having the powers of a tenant for life under this Act, may make in any case, or in the particular case, a lease or grant of or affecting the settled land, or part thereof, in conformity with the order.

<sup>1</sup> This is an extension of the power conferred on the Court by s. 4(1) of the S. E. A. 1877, p. 410, *ante*. See that section and cases cited thereunder.

Applications under s. 4 of the S. E. A. 1877 are to be made by petition (u).

<sup>2</sup> Applications under the S. L. A. 1882 may be either by petition or summons (x); but if a petition is presented without the authority of the judge, no costs beyond the costs of a summons are to be allowed (y).

#### MINING LEASES—PART OF RENT CAPITALISED.

11. Under a mining lease, whether the mines or minerals leased are already opened or in work or not, unless a contrary intention<sup>1</sup> is expressed in the settlement, there shall be from time to time set aside, as capital money arising under this Act, part of the rent as follows, namely,—where the tenant for life is impeachable for waste<sup>1</sup> in respect of minerals, three fourth<sup>2</sup> parts of the rent, and otherwise one fourth<sup>2</sup> part thereof, and in every such case the residue of the rent shall go as rents and profits.

45 & 46  
Vict. c. 38,  
§ 11.

Part of  
mining  
rent to be  
set aside  
as capital.

Compare the latter portion of s. 4 (3) of the S. E. A. 1877 (z).

<sup>1</sup> Where a settlement conferred upon trustees power to grant mining leases and authorised them to receive all rents and profits, and to apply them in payment of expenses of management and for the maintenance of an infant tenant in tail, and for other purposes, PEARSON, J., held that a “contrary intention” was expressed, and that the rents under mining-leases were to be paid to the trustees and dealt with as directed by the settlement (a).

<sup>2</sup> As to payment of capital money, see s. 22 (b).

Compare s. 4 of the S. L. A. 1884 (c).

(u) S. E. A., s. 23, p. 435.

(x) Sect. 46 (3), p. 514, *post*.

(y) S. L. A. Orders, R. 2.

(z) P. 412, *ante*.

(a) *Re Newcastle*, 24 Ch. D. 129.

(b) P. 494, *post*.

(c) P. 480, *ante*.

45 & 46  
Vict. c. 38,

**§ 12.**

Leasing  
powers for  
special  
objects.

Predeces-  
sor's con-  
tract.

Covenant  
for re-  
newal.

Confirma-  
tion of  
lease.

LEASES—SPECIAL POWERS.

**12.** The leasing power of a tenant for life extends to the making of—

- (i.) A lease for giving effect to a contract<sup>1</sup> entered into by any of his predecessors in title for making a lease, which, if made by the predecessor, would have been binding on the successors in title;<sup>1</sup> and
- (ii.) A lease for giving effect to a covenant of renewal,<sup>1</sup> performance whereof could be enforced against the owner for the time being of the settled land; and
- (iii.) A lease for confirming,<sup>1</sup> as far as may be, a previous lease, being void or voidable; but so that every lease, as and when confirmed, shall be such a lease as might at the date of the original lease have been lawfully granted, under this Act, or otherwise, as the case may require.

<sup>1</sup> As to contracts, see also s. 31 and notes thereto (d).

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LEASES—SURRENDERS.

45 & 46  
Vict. c. 38,  
**§ 13.**

Surrender  
and new  
grant of  
leases.

Apportion-  
ment of  
rent.

New lease.

**13.—(1.)** A tenant for life may accept, with or without consideration, a surrender of any lease of settled land, whether made under this Act or not, in respect of the whole land leased, or any part thereof, with or without an exception of all or any of the mines and minerals therein, or in respect of mines and minerals, or any of them.

**(2.)** On a surrender of a lease in respect of part only of the land or mines and minerals leased, the rent may be apportioned.

**(3.)** On a surrender, the tenant for life may make of the land or mines and minerals surrendered, or of any part thereof, a new or other lease, or new or other leases in lots.

**(4.)** A new or other lease may comprise additional land or mines and minerals, and may reserve any apportioned or other rent.

(d) P. 503, *post*.

(5.) On a surrender, and the making of a new or other lease, whether for the same or for any extended or other term, and whether or not subject to the same or to any other covenants, provisions, or conditions, the value of the lessee's interest in the lease surrendered may be taken into account in the determination of the amount of the rent to be reserved, and of any fine to be taken, and of the nature of the covenants, provisions, and conditions to be inserted in the new or other lease.

45 & 46  
Vict. c. 38,  
§ 13.  
Value of  
lessee's  
interest  
recognized.

(6.) Every new or other lease shall be in conformity with this Act.

This is an extension of the provisions of s. 7 of the S. E. A. 1877 (*e*). Sub-sect. 5 settles a question which arose under that section in accordance with *Re Rawlins* (*f*).

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LEASES—COPYHOLDS.<sup>1</sup>

14.—(1.) A tenant for life may grant to a tenant of copyhold or customary land, parcel of a manor comprised in the settlement, a licence to make any such lease of that land, or of a specified part thereof, as the tenant for life is by this Act empowered to make of freehold land.<sup>2</sup>

45 & 46  
Vict. c. 38,  
§ 14.  
Power to  
grant to  
copy-  
holders  
licences  
for leasing.

(2.) The licence may fix the annual value whereon fines, fees, or other customary payments are to be assessed, or the amount of those fines, fees, or payments.

(3.) The licence shall be entered on the court rolls of the manor, of which entry a certificate in writing of the steward shall be sufficient evidence.

<sup>1</sup> Compare s. 9 of the S. E. A. 1877 (*g*).

<sup>2</sup> The effect of this Act as to leases of copyholds appears to be as follows:—

Subject to the rights of the lord, a tenant for life of copyholds may, under the preceding sections, grant such a lease as a tenant for life of freeholds may grant. But if any such lease is contrary to the customs of the

(*e*) P. 414, *ante*.

(*f*) L. R. 1 Eq. 286.

(*g*) P. 414, *ante*.

45 & 46  
Vict. c. 38,  
**§ 14.** manor, it will be a ground of forfeiture unless the licence of the lord has been obtained. Where the manor is not in settlement, the lord may, of course, give a licence authorising any lease he pleases by a copyholder. But where the manor is in settlement, the tenant for life of the manor can, under s. 14, license only such leases by copyholders—whether tenants for life or not—as he could himself grant of freehold land under the earlier sections of the Act.

#### V.—SALES, ETC.

##### MANSION AND PARK.

45 & 46  
Vict. c. 38,  
**§ 15.** Restriction as to mansion house, park, &c. **15.** Notwithstanding anything in this Act,<sup>1</sup> the principal mansion house<sup>2</sup> on any settled land, and the demesnes thereof, and other lands usually occupied therewith, shall not be sold or leased<sup>3</sup> by the tenant for life, without the consent of the trustees of the settlement, or an order of the Court.<sup>4</sup>

<sup>1</sup> As to leases, compare s. 46 of the S. E. A. 1877 (*h*).

<sup>2</sup> No judicial interpretation has yet been placed upon the words “principal mansion house” in this section. The views expressed by JESSEL, M.R., on a sale under the S. E. A. 1877 as to what constituted a “family mansion” (*i*) would probably not be adopted in construing this section.

<sup>3</sup> It is worthy of note that this section does not, in terms, extend to an exchange, partition, mortgage, or charge.

<sup>4</sup> An order of the Court can, in a proper case, be obtained on summons served on the trustees. As to what constitutes a proper case, some guide may be afforded by a reference to *Cumden v. Murray* (*k*).

Where certain heirlooms were, by will, directed to be kept in a settled mansion, a summons asking for liberty to sell the house was ordered to be amended so as to include the heirlooms; and leave was given to the tenant for life to bid for them (*l*).

It would appear that where a tenant for life is an infant, the trustees of the settlement have under this section and s. 60 absolute power to sell or lease the principal mansion house, &c., but they cannot be advised to do so without the sanction of the Court.

##### STREETS AND OPEN SPACES.<sup>1</sup>

45 & 46  
Vict. c. 38,  
**§ 16.** Dedication for streets, **16.** On or in connection with a sale or grant for building purposes, or a building lease, the tenant for life, for the general benefit of the residents on the settled land, or on any part thereof,<sup>2</sup>—

(*h*) P. 448, *ante*.

(*i*) *Re Spurway*, 10 Ch. D. 230—233.

(*k*) 27 S. J. 652.

(*l*) *Re Brown*, W. N. (1884), 157.

- (i.) May cause or require any parts of the settled land to be appropriated and laid out for streets, roads, paths, squares, gardens, or other open spaces, for the use, gratuitously or on payment, of the public or of individuals, with sewers, drains, watercourses, fencing, paving, or other works necessary or proper in connection therewith; and <sup>45 & 46 Vict. c. 38, § 16.</sup>
- (ii.) May provide that the parts so appropriated shall be conveyed to or vested in the trustees of the settlement, or other trustees, or any company or public body, on trusts or subject to provisions for securing the continued appropriation thereof to the purposes aforesaid, and the continued repair or maintenance of streets and other places and works aforesaid, with or without provision for appointment of new trustees when required; and <sup>Vesting in trustees.</sup>
- (iii.) May execute any general or other deed necessary or proper for giving effect to the provisions of this section (which deed may be inrolled in the Central Office of the Supreme Court of Judicature), and thereby declare the mode, terms, and conditions of the appropriation, and the manner in which and the persons by whom the benefit thereof is to be enjoyed, and the nature and extent of the privileges and conveniences granted. <sup>Inrolment of deed.</sup>

<sup>1</sup> Compare the powers given to tenants for life and others by the Schools Sites Act, 1841 (*l*), the Consecration of Churchyards Act, 1867 (*m*), and the Places of Worship Sites Acts, 1873 (*n*) and 1882 (*o*); and see Dart, V. & P. (*p*).

<sup>2</sup> It will be observed that the appropriation of settled land for the purposes mentioned in this section is only authorised "on or in connection with a sale or grant for building purposes or a building lease," and that it must be "for the general benefit of the residents" on the settled land. In cases which do not come either within this section or

(*l*) 4 & 5 Vict. c. 38.

(*m*) 30 & 31 Vict. c. 133.

(*n*) 36 & 37 Vict. c. 50.

(*o*) 45 & 46 Vict. c. 21.

(*p*) 5th ed. p. 15.

45 & 46  
Vict. c. 38,  
**§ 16.** within any of the statutes mentioned in the preceding note, it will be necessary to apply to the Court under ss. 20 and 21 of the S. E. A. 1877 (*q*).

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### SURFACE AND MINERALS APART.<sup>1</sup>

45 & 46  
Vict. c. 38,  
**§ 17.** **17.**—(1.) A sale, exchange, partition, or mining lease,<sup>2</sup> may be made either of land, with or without an exception or reservation of all or any of the mines and minerals therein,<sup>3</sup> or of any mines and minerals, and in any such case with or without a grant or reservation of powers of working, way-leaves or rights of way, rights of water and drainage, and other powers, easements, rights, and privileges for or incident to or connected with mining purposes, in relation to the settled land, or any part thereof, or any other land.

Separate  
dealing  
with sur-  
face and  
minerals,  
with or  
without  
way-  
leaves, &c.

(2.) An exchange or partition may be made subject to and in consideration of the reservation of an undivided share in mines or minerals.

<sup>1</sup> Compare s. 19 of the S. E. A. 1877 (*r*).

<sup>2</sup> For the general powers of a tenant for life as to sale, exchange, and partition of land, see ss. 3 and 4 (*s*); and as to mining leases, ss. 6 and 7 (*t*), and ss. 9 to 11 (*u*), and the notes thereto.

<sup>3</sup> Where trustees of a settlement had a power of sale, but such power did not authorise them to sell surface land apart from minerals, it was held that they could do so under this section and s. 60, and that, as in so doing, they would sell under the S. L. A. and not under the settlement, the consent to a sale prescribed by the settlement was not necessary (*x*).

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### MORTGAGE.

45 & 46  
Vict. c. 38,  
**§ 18.** **18.** Where money is required for enfranchisement, or for equality of exchange or partition, the tenant for life may raise the same on mortgage of the settled land, or of any

Mortgage  
for

(*q*) P. 422—3, *ante*.  
(*r*) P. 422, *ante*.  
(*s*) Pp. 475, 477, *ante*.  
(*t*) Pp. 479—80, *ante*.

(*u*) Pp. 481, 483, *ante*.  
(*x*) *Re Newcastle*, 24 Ch. D. 129—  
142.

part thereof, by conveyance of the fee simple, or other estate or interest the subject of the settlement, or by creation of a term of years in the settled land, or otherwise,<sup>1</sup> and the money raised shall be capital money<sup>2</sup> arising under this Act.<sup>3</sup>

45 & 46  
Vict. c. 38,  
§ 18.  
equality  
money, &c.

<sup>1</sup> The mortgagee is not concerned to see that the money advanced by him is wanted for the purposes specified in this section if he obtains the receipt of the trustees of the settlement (*y*).

<sup>2</sup> It must be paid either to the trustees or into Court (*z*), and not to the tenant for life.

<sup>3</sup> It will be observed that the power to mortgage under this section is limited to cases where money is required for enfranchisement, equality of exchange or partition. It does not authorise a mortgage to raise money for improvements under s. 25 ; but this can be done under the Improvement of Land Act, 1864 (*a*), as amended by s. 30 of the S. L. A. 1882 (*b*). But when more money has been raised for any purpose authorised by this section than is actually required for such purpose, the provision that it shall be capital money arising under the Act, when read with s. 21 (*iii.*), will authorise the application of any surplus in payment for any improvement mentioned in s. 25. A mortgage to raise money for costs, charges, and expenses may be authorised by the Court under s. 47 (*c*).

## UNDIVIDED SHARES.

**19.** Where the settled land comprises an undivided share in land, or under the settlement, the settled land has come to be held in undivided shares, the tenant for life of an undivided share may join or concur,<sup>1</sup> in any manner and to any extent necessary or proper for any purpose of this Act, with any person entitled to or having power or right of disposition of or over another undivided share.

45 & 46  
Vict. c. 38,  
§ 19.  
Concur-  
rence in  
exercise of  
powers as  
to undi-  
vided  
share.

<sup>1</sup> Under s. 2 (5 and 6) where two or more persons are for the time being under a settlement beneficially entitled to possession of settled land as tenants in common or as joint tenants or for other concurrent estates or interests, they *together* constitute a tenant for life for the pur-

(*y*) Sect. 40, p. 510, *post*.

(*z*) Sect. 22, p. 494, *post*.

(*a*) 27 & 28 Vict. c. 114.

(*b*) P. 502, *post*.

(*c*) P. 516, *post*.



**45 & 46** poses of this Act. A person entitled for life to an undivided share in  
**Vict. c. 38,** settled land cannot, therefore, deal *alone* with the fee. The person  
**§ 19.** entitled to the other undivided share must join or concur with him in  
accordance with the provisions of this section, and in that case a sale can  
be carried out without any application to the Court under the Partition  
Acts.

Where all persons, constituting the tenant for life of the entirety, will  
not concur in a sale under the S. L. A. it will still be necessary to have  
recourse to proceedings under the Partition Acts (*d*).

Where some of them are infants, the trustees of the settlement  
can act for them under s. 60 (*e*); and the Court will, if necessary,  
appoint trustees under s. 38 (*f*).

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### CONVEYANCE.

**45 & 46** **20.**—(1.) On a sale, exchange, partition, lease, mortgage,  
**Vict. c. 38,** or charge, the tenant for life may, as regards land sold, given  
**§ 20.** in exchange or on partition, leased, mortgaged, or charged, or  
intended so to be, including copyhold or customary or lease-  
hold land vested in trustees, or as regards easements or other  
rights or privileges sold or leased, or intended so to be, convey  
or create the same by deed, for the estate or interest the  
subject of the settlement, or for any less estate or interest, to  
the uses and in the manner requisite for giving effect to the  
sale, exchange, partition, lease, mortgage, or charge.

**Validity of** (2.) Such a deed, to the extent and in the manner to and  
**deeds.** in which it is expressed or intended to operate and can  
operate under this Act, is effectual to pass the land conveyed,  
or the easements, rights, or privileges created, discharged from  
all the limitations, powers, and provisions of the settlement,  
and from all estates, interests, and charges subsisting or to  
arise thereunder, but subject to and with the exception of—

- Excep-**  
**tions.**
- (i.) All estates, interests, and charges having priority to the  
settlement; and
  - (ii.) All such other, if any, estates, interests, and charges

(*d*) P. 108, *ante*.  
(*e*) P. 527, *post*.

(*f*) *Re Wells*, 31 W. R. 764.

as have been conveyed or created for securing money actually raised at the date of the deed ; and

45 & 46  
Vict. c. 38,  
**§ 20.**

- (iii.) All leases and grants at fee-farm rents or otherwise, and all grants of easements, rights of common, or other rights or privileges granted or made for value in money or money's worth, or agreed so to be, before the date of the deed, by the tenant for life, or by any of his predecessors in title, or by any trustees for him or them, under the settlement, or under any statutory power, or being otherwise binding on the successors in title of the tenant for life.

(3.) In case of a deed relating to copyhold or customary land, it is sufficient that the deed be entered on the court rolls of the manor, and the steward is hereby required on production to him of the deed to make the proper entry ; and on that production, and on payment of customary fines, fees, and other dues or payments, any person whose title under the deed requires to be perfected by admittance shall be admitted accordingly ; but if the steward so requires, there shall also be produced to him so much of the settlement as may be necessary to show the title of the person executing the deed ; and the same may, if the steward thinks fit, be also entered on the court rolls.

Inrolment  
of deeds  
relating to  
copyhold.

Compare s. 22 of the S. E. A. 1877 (*g*) ; and see cases there cited. As to leases, see also ss. 12 and 47 of that Act (*h*).

## VI.—INVESTMENT OR OTHER APPLICATION OF CAPITAL TRUST MONEY.

**21.** Capital money arising under this Act,<sup>1</sup> subject to payment of claims properly payable thereout, and to application hereof for any special authorised object for which the same was raised, shall, when received,<sup>2</sup> be invested or otherwise

45 & 46  
Vict. c. 38,  
**§ 21.**  
Capital  
money

(*g*) P. 424, *ante*.

(*h*) Pp. 416, 450, *ante*.

45 & 46  
Vict. c. 38,  
§ 21.

under Act;  
invest-  
ment, &c.,  
by trustees  
or court.

applied<sup>3</sup> wholly in one, or partly in one and partly in another or others, of the following modes (namely) :—

- (i.) In investment on Government securities, or on other securities on which the trustees of the settlement are by the settlement<sup>4</sup> or by law authorised to invest trust money of the settlement, or on security of the bonds, mortgages, or debentures, or in the purchase of the debenture stock, of any railway company in Great Britain or Ireland incorporated by special Act of Parliament, and having for ten years next before the date of investment paid a dividend on its ordinary stock or shares, with power to vary the investment into or for any other such securities :
- (ii.) In discharge, purchase, or redemption of incumbrances affecting the inheritance of the settled land,<sup>5</sup> or other the whole estate the subject of the settlement, or of land-tax, rentcharge in lieu of tithe, Crown rent, chief rent, or quit rent, charged on or payable out of the settled land :
- (iii.) In payment for any improvement authorised by this Act :
- (iv.) In payment for equality of exchange or partition of settled land :
- (v.) In purchase of the seignory of any part of the settled land, being freehold land, or in purchase of the fee simple of any part of the settled land, being copyhold or customary land :
- (vi.) In purchase of the reversion or freehold in fee of any part of the settled land, being leasehold land held for years, or life, or years determinable on life :
- (vii.) In purchase of land in fee simple, or of copyhold or customary land, or of leasehold land held for sixty years or more unexpired at the time of purchase, subject or not to any exception or reservation of or in respect of mines or minerals therein, or of or in respect of rights or powers relative to the

working of mines or minerals therein, or in other land : 45 & 46  
Vict. c. 38,  
§ 21.

- (viii.) In purchase, either in fee simple, or for a term of sixty years or more, of mines and minerals convenient to be held or worked with the settled land, or of any easement, right, or privilege convenient to be held with the settled land for mining or other purposes :
- (ix.) In payment to any person becoming absolutely entitled or empowered to give an absolute discharge :
- (x.) In payment of costs, charges, and expenses of or incidental to the exercise of any of the powers, or the execution of any of the provisions, of this Act :
- (xi.) In any other mode in which money produced by the exercise of a power of sale in the settlement is applicable thereunder.

Compare this section with s. 34 of the S. E. A. 1877 (i).

<sup>1</sup> The sections under which capital money may arise are ss. 3 (i. to iv.), 6 to 16, 18, 31 to 35 and 37. Also s. 4 of the S. L. A. 1884 (k).

<sup>2</sup> If not paid into Court, it must in all cases be received by the trustees of the settlement (l).

<sup>3</sup> The investment or application must be made by the trustees, but they are bound to act under the direction of the tenant for life. See s. 22 (2) and notes thereto (m).

<sup>4</sup> It has been held that the Court will not allow trustees to retain investments in securities which are not authorised by the settlement, unless such retention will be for the benefit of the beneficiaries, even though such investments are authorised by this section, and a conversion of them would cause loss of income (n). It is conceived that in this case the trustees had no power to invest in the purchase of land. Had the trust money come within any of the descriptions in ss. 32 and 33, the decision must have been otherwise. See those sections and cases thereunder (o).

In sanctioning an investment in debentures or debenture stock of a

(i) P. 437, *ante*.

(k) P. 480, *ante*.

(l) Sect. 22, p. 494, *post*.

(m) P. 494, *post*.

(n) *Fox v. Dolby*, W. N. (1888), p. 29.

(o) Pp. 504—6, *post*.

45 & 46  
Vict. c. 38,  
**§ 21.**

railway company, the Court will not take judicial notice of the fact that the company has paid a dividend on its ordinary stock or shares for ten years, but will require that fact to be proved (*p*).

<sup>5</sup> This has been construed by PEARSON, J., to mean incumbrances affecting the inheritance of the land which is sold, or any other land which is the subject of the settlement (*q*).

The Settled Land Act was not intended to relieve the tenant for life from liabilities which he had taken on himself before that Act came into operation. And it was accordingly held that terminable charges upon settled land for drainage improvements made before the commencement of this Act, under the Improvement of Land Act, 1864, are not "incumbrances affecting the inheritance," and cannot be paid out of capital even though they are such as would have been authorised or sanctioned under sections 25 and 26, the operation of such sections being prospective not retrospective (*r*).

For improvements authorised by this Act, see s. 25, p. 497, *post*, and for mode of application of capital money in improvements, see s. 26, *et seq.* (*s*).

As to the meaning of "person becoming absolutely entitled," see notes to s. 34 of the S. E. A. 1877 (*t*).

45 & 46  
Vict. c. 38,  
**§ 22.**

Regula-  
tions res-  
pecting in-  
vestment,  
devolution,  
and income  
of securi-  
ties, &c.  
Tenant for  
life may  
direct in-  
vestments.

**22.**—(1.) Capital money arising under this Act shall, in order to its being invested or applied as aforesaid, be paid either to the trustees of the settlement or into Court, at the option of the tenant for life, and shall be invested or applied by the trustees, or under the direction of the Court, as the case may be, accordingly.

(2.) The investment or other application by the trustees shall be made according to the direction of the tenant for life,<sup>1</sup> and in default thereof, according to the discretion of the trustees, but in the last-mentioned case subject to any consent required or direction given by the settlement with respect to the investment or other application by the trustees of trust money of the settlement; and any investment shall be in the names or under the control of the trustees.

(3.) The investment or other application under the direction of the Court shall be made on the application of the tenant for life,<sup>1</sup> or of the trustees.

(*p*) *Re Byron*, 31 W. R. 517.  
(*q*) *Re Chaytor*, 25 Ch. D. 651.  
(*r*) *Re Knatchbull*, 28 S. J. 691.

(*s*) P. 499, *post*.  
(*t*) P. 437, *ante*.

(4.) Any investment or other application shall not during the life of the tenant for life be altered without his consent.<sup>1</sup>

45 & 46  
Vict. c. 38,  
§ 22.

(5.) Capital money arising under this Act while remaining uninvested or unapplied, and securities on which an investment of any such capital money is made, shall, for all purposes of disposition, transmission, and devolution, be considered as land, and the same shall be held for and go to the same persons successively, in the same manner and for and on the same estates, interests, and trusts, as the land wherefrom the money arises would, if not disposed of, have been held and have gone under the settlement.

Invest-  
ments con-  
sidered as  
land.

(6.) The income of those securities shall be paid or applied as the income of that land, if not disposed of, would have been payable or applicable under the settlement.

(7.) Those securities may be converted into money, which shall be capital money arising under this Act.

Compare ss. 35 and 36 of the S. E. A., 1877 (*u*).

<sup>1</sup> It will be observed that where the money is paid to the trustees and not into Court, the tenant for life has complete control over the mode of investment. In cases where he desires to exercise such control, the trustees are bound to apply the money in any mode authorised by s. 21 which he may indicate. It is only where he gives no direction that the trustees may exercise their own discretion. But in the event of a tenant for life directing an investment which the trustees do not consider to be authorised by s. 21, or to be consistent with the interests of the remaindermen, they may take the opinion of the Court on summons under s. 44, p. 512, *post*. Although they are not liable for neglecting to make any application which the Act authorises them to make (*x*), they would be liable for any loss occasioned by a breach of trust, such as an investment in unauthorised securities.

**23.** Capital money arising under this Act from settled land in England shall not be applied in the purchase of land out of England, unless the settlement expressly authorises the same.

45 & 46  
Vict. c. 38,  
§ 23.

**24.**—(1.) Land acquired by purchase or in exchange, or on partition, shall be made subject to the settlement in manner directed in this section.

Invest-  
ment in  
land in  
England.  
45 & 46  
Vict. c. 38,  
§ 24.

(*u*) P. 440—1, *ante*.

(*x*) Sect. 42, p. 511, *post*.

45 & 46  
Vict. c. 38,  
§ 24.

Settlement  
of land  
purchased,  
taken in  
exchange,  
&c.

Freehold.  
Copyhold,  
leasehold,  
&c.

(2.) Freehold land shall be conveyed to the uses, on the trusts, and subject to the powers and provisions which, under the settlement, or by reason of the exercise of any power of charging therein contained, are subsisting with respect to the settled land, or as near thereto as circumstances permit, but not so as to increase or multiply charges or powers of charging.

(3.) Copyhold, customary, or leasehold land shall be conveyed to and vested in the trustees of the settlement on trusts and subject to powers and provisions corresponding, as nearly as the law and circumstances permit, with the uses, trusts, powers, and provisions to on and subject to which freehold land is to be conveyed as aforesaid; so nevertheless that the beneficial interest in land held by lease for years shall not vest absolutely in a person who is by the settlement made by purchase tenant in tail, or in tail male, or in tail female, and who dies under the age of twenty-one years, but shall, on the death of that person under that age, go as freehold land conveyed as aforesaid would go.

Transfer of  
charges to  
new land.

(4.) Land acquired as aforesaid may be made a substituted security for any charge in respect of money actually raised, and remaining unpaid, from which the settled land, or any part thereof, or any undivided share therein, has theretofore been released on the occasion and in order to the completion of a sale, exchange, or partition.

(5.) Where a charge does not affect the whole of the settled land, then the land acquired shall not be subjected thereto, unless the land is acquired either by purchase with money arising from sale of land which was before the sale subject to the charge, or by an exchange or partition of land which, or an undivided share wherein, was before the exchange or partition subject to the charge.

Protection  
of vendor.

(6.) On land being so acquired, any person who, by the direction of the tenant for life, so conveys the land as to subject it to any charge, is not concerned to inquire whether or not it is proper that the land should be subjected to the charge.

(7.) The provisions of this section referring to land extend and apply, as far as may be, to mines and minerals, and to easements, rights, and privileges over and in relation to land. 45 & 46  
Vict. c. 38,  
§ 24.

## VII.—IMPROVEMENTS.

### IMPROVEMENTS WITH CAPITAL TRUST MONEY.

**25.** Improvements authorised by this Act are the making or execution on, or in connection with, and for the benefit of settled land, of any of the following works, or of any works for any of the following purposes, and any operation incident to or necessary or proper in the execution of any of those works, or necessary or proper for carrying into effect any of those purposes, or for securing the full benefit of any of those works or purposes, namely:

45 & 46  
Vict. c. 38,  
§ 25.

Description of  
improvements  
authorised  
by Act.

- (i.) Drainage, including the straightening, widening, or deepening of drains, streams, and watercourses;
- (ii.) Irrigation; warping;
- (iii.) Drains, pipes, and machinery for supply and distribution of sewage as manure;
- (iv.) Embanking or weiring from a river or lake, or from the sea, or a tidal water;
- (v.) Groynes; sea walls; defences against water;
- (vi.) Inclosing; straightening of fences; re-division of fields;
- (vii.) Reclamation; dry warping;
- (viii.) Farm roads; private roads; roads or streets in villages or towns;
- (ix.) Clearing; trenching; planting;
- (x.) Cottages for labourers, farm-servants, and artisans, employed on the settled land or not;
- (xi.) Farmhouses, offices, and out-buildings, and other buildings for farm purposes;
- (xii.) Saw mills, scutch mills, and other mills, water wheels, engine-houses, and kilns, which will increase the



45 & 46  
 Vict. c. 38,  
§ 25.

- value of the settled land for agricultural purposes or as woodland or otherwise;
- (xiii.) Reservoirs, tanks, conduits, watercourses, pipes, wells, ponds, shafts, dams, weirs, sluices, and other works and machinery for supply and distribution of water for agricultural, manufacturing, or other purposes, or for domestic or other consumption;
  - (xiv.) Tramways; railways; canals; docks;
  - (xv.) Jetties, piers, and landing places on rivers, lakes, the sea, or tidal waters, for facilitating transport of persons and of agricultural stock and produce, and of manure and other things required for agricultural purposes, and of minerals, and of things required for mining purposes;
  - (xvi.) Markets and market places;
  - (xvii.) Streets, roads, paths, squares, gardens, or other open spaces for the use, gratuitously or on payment, of the public or of individuals, or for dedication to the public, the same being necessary or proper in connection with the conversion of land into building land;
  - (xviii.) Sewers, drains, watercourses, pipe-making, fencing, paving, brick-making, tile-making, and other works necessary or proper in connection with any of the objects aforesaid;
  - (xix.) Trial pits for mines, and other preliminary works necessary or proper in connection with development of mines;
  - (xx.) Reconstruction, enlargement, or improvement of any of those works.

Sect. 9 of the Improvement of Land Act, 1864, is now to be read as if all the improvements mentioned in this section were enumerated therein (z).

This section is not retrospective, so as to enable a tenant for life to discharge out of capital money charges incurred by him, under the Im-

(z) Sect. 30, p. 502, *post*.

provement of Land Act, 1864, before the passing of this Act for improvements described in this section (a).

45 & 46  
Vict. c. 38,  
§ 25.

**26.**—(1.) Where the tenant for life is desirous that capital money arising under this Act shall be applied in or towards payment for an improvement authorised by this Act, he may submit for approval to the trustees<sup>1</sup> of the settlement, or to the Court,<sup>2</sup> as the case may require, a scheme for the execution of the improvement, showing the proposed expenditure thereon.

45 & 46  
Vict. c. 38,  
§ 26.

(2.) Where the capital money to be expended is in the hands of trustees, then, after a scheme is approved by them, the trustees may apply that money in or towards payment for the whole or part of any work or operation comprised in the improvement, on—

Approval  
by land  
commis-  
sioners of  
scheme for  
improve-  
ment and  
payment  
thereon.  
Money in  
hands of  
trustees.

- (i.) A certificate of the Land Commissioners<sup>4</sup> certifying that the work or operation, or some specified part thereof, has been properly executed, and what amount is properly payable by the trustees in respect thereof, which certificate shall be conclusive in favour of the trustees as an authority and discharge for any payment made by them in pursuance thereof; or on
- (ii.) A like certificate of a competent engineer or able practical surveyor nominated by the trustees and approved by the Commissioners, or by the Court, which certificate shall be conclusive as aforesaid; or on
- (iii.) An order of the Court directing or authorising the trustees to so apply a specified portion of the capital money.

(3.) Where the capital money to be expended is in Court, then, after a scheme is approved by the Court, the Court may, if it thinks fit, on a report or certificate<sup>3</sup> of the commissioners, or of a competent engineer or able practical surveyor, approved by the Court, or on such other evidence as the

Money in  
Court.

(a) *Re Knatchbull*, 28 S. J. 691.

45 & 46  
Vict. c. 38,  
§ 26.

Court thinks sufficient, make such order and give such directions<sup>2</sup> as it thinks fit for the application of that money or any part thereof, in or towards payment for the whole or part of any work or operation comprised in the improvement.

Applica-  
tions to  
Court.

<sup>1</sup> If any difference arises between the tenant for life and the trustees as to the approval of a scheme, either party can take the opinion of the Court under s. 44 (b).

<sup>2</sup> Applications to the Court must be to the Chancery Division, by petition or summons (c); but if a petition is presented without the direction of the judge, the costs of a summons only will be allowed (d). This section and section 25 are not retrospective, so as to enable the Court to authorise the expenditure of capital money in payment of charges for improvements effected before 1st January, 1883, under the Improvement of Land Act, 1864 (e). Whether they are so far retrospective as to authorise the expenditure of capital money on improvements specified in s. 25, and completed or in progress on 1st January, 1883, but not charged on the land under the Improvement of Land Act, 1864, has not been decided. Having regard to the provisions of ss. 32 and 33 as to capital money, and to the decisions in *Re Harrop* (f), and *Re Twyford Abbey* (g), it would be reasonable to construe them as retrospective to that extent.

<sup>3</sup> For the provisions relating to the filing of certificates and reports see s. 49 (h).

The certificate may prescribe during what period the improvements are to be maintained or repaired by the tenant for life.

<sup>4</sup> For the definition of the Land Commissioners, their powers and fees or security for costs, see s. 48 (i).

45 & 46  
Vict. c. 38,  
§ 27.

Concur-  
rence in  
improve-  
ments.

45 & 46  
Vict. c. 38,  
§ 28.

Obligation  
on tenant

**27.** The tenant for life may join or concur with any other person interested in executing any improvement authorised by this Act, or in contributing to the cost thereof.

**28.**—(1.) The tenant for life, and each of his successors in title having, under the settlement, a limited estate or interest only in the settled land, shall, during such period, if any, as the Land Commissioners by certificate in any case prescribe, maintain<sup>1</sup> and repair, at his own expense, every improvement

(b) P. 512, *post*.

(c) Sect. 46 (1) (3), p. 514, *post*.

(d) S. L. A. Rules, R. 2, p. 538.

(e) *Re Knatchbull*, 28 S. J. 691.

(f) 24 Ch. D. 717.

(g) 30 W. R. 268.

(h) P. 516, *post*.

(i) P. 518, *post*.

executed under the foregoing provisions of this Act, and where a building or work in its nature insurable against damage by fire is comprised in the improvement, shall insure<sup>1</sup> and keep insured the same, at his own expense, in such amount, if any, as the Commissioners by certificate in any case prescribe.

45 & 46  
Vict. c. 38,  
§ 28.

for life and  
successors  
to main-  
tain,  
insure, &c.

(2.) The tenant for life, or any of his successors as aforesaid, shall not cut down, or knowingly permit to be cut down, except in proper thinning, any trees planted as an improvement under the foregoing provisions of this Act.

Cutting  
timber.

(3.) The tenant for life, and each of his successors as aforesaid, shall from time to time, if required by the Commissioners, on or without the suggestion of any person having, under the settlement, any estate or interest in the settled land in possession, remainder, or otherwise, report to the Commissioners the state of every improvement executed under this Act, and the fact and particulars of fire insurance, if any.

Reports as  
to improve-  
ments.

(4.) The Commissioners may vary any certificate made by them, under this section, in such manner or to such extent as circumstances appear to them to require, but not so as to increase the liabilities of the tenant for life, or any of his successors as aforesaid.

Variation  
of certifi-  
cate.

(5.) If the tenant for life, or any of his successors, as aforesaid, fails in any respect to comply with the requisitions of this section, or does any act in contravention thereof, any person having, under the settlement, any estate or interest in the settled land in possession, remainder, or reversion, shall have a right of action, in respect of that default or act, against the tenant for life; and the estate of the tenant for life, after his death, shall be liable to make good to the persons entitled under the settlement any damages occasioned by that default or act.

Failure to  
obey this  
section.

<sup>1</sup> As to maintenance and insurance, compare sections 72 and 74 of the Improvement of Land Act, 1864 (j).

EXECUTION AND REPAIR OF IMPROVEMENTS.<sup>1</sup>

45 & 46  
Vict. c. 38,  
**§ 29.**

Protection  
as regards  
waste in  
execution  
and repair  
of improve-  
ments.

**29.** The tenant for life, and each of his successors in title having, under the settlement, a limited estate or interest only in the settled land, and all persons employed by or under contract with the tenant for life, or any such successor, may from time to time enter on the settled land, and without impeachment of waste by any remainderman or reversioner, thereon execute any improvement authorised by this Act, or inspect, maintain, and repair the same, and, for the purposes thereof, on the settled land, do, make, and use all acts, works, and conveniences proper for the execution, maintenance, repair, and use thereof, and get and work freestone, limestone, clay, sand, and other substances, and make tramways and other ways, and burn and make bricks, tiles, and other things, and cut down and use timber and other trees not planted or left standing for shelter or ornament.

<sup>1</sup> Compare the provisions of this section with those contained in section 34 of the Improvement of Land Act, 1864 (*k*).

## IMPROVEMENT OF LAND ACT, 1864.

45 & 46  
Vict. c. 38,  
**§ 30.**

Extension  
of 27 & 28  
Vict. c.  
114, s. 9.

**30.** The enumeration of improvements contained in section nine of the Improvement of Land Act, 1864, is hereby extended so as to comprise, subject and according to the provisions of that Act, but only as regards applications made to the Land Commissioners after the commencement of this Act, all improvements authorised by this Act.<sup>1</sup>

<sup>1</sup> See s. 9 of the Improvement of Land Act, 1864 (*l*).

(*k*) 27 & 28 Vict. c. 114.

(*l*) 27 & 28 Vict. c. 114.

VIII.—CONTRACTS.<sup>1</sup>

**31.—(1.) A tenant for life—**

- (i.) May contract to make any sale, exchange, partition, mortgage, or charge; and
- (ii.) May vary or rescind, with or without consideration, the contract, in the like cases and manner in which, if he were absolute owner of the settled land, he might lawfully vary or rescind the same, but so that the contract as varied be in conformity with this Act; and any such consideration, if paid in money, shall be capital money arising under this Act; and
- (iii.) May contract to make any lease; and in making the lease may vary the terms, with or without consideration, but so that the lease be in conformity with this Act; and
- (iv.) May accept a surrender of a contract for a lease, in like manner and on the like terms in and on which he might accept a surrender of a lease; and thereupon may make a new or other contract, or new or other contracts, for or relative to a lease or leases, in like manner and on the like terms in and on which he might make a new or other lease, or new or other leases, where a lease had been granted; and
- (v.) May enter into a contract for or relating to the execution of any improvement authorised by this Act, and may vary or rescind the same; and
- (vi.) May, in any other case, enter into a contract to do any Act for carrying into effect any of the purposes of this Act, and may vary or rescind the same.

45 & 56  
Vict. c. 38,  
**§ 31.**

Power for  
tenant for  
life to  
enter into  
contracts,

accept  
surrenders,  
&c.

(2.) Every contract shall be binding on and shall enure for the benefit of the settled land, and shall be enforceable against and by every successor in title for the time being of the tenant for life, and may be carried into effect by any such successor; but so that it may be varied or rescinded by any such successor, in the like case and manner, if any, as if it had been made by himself.

Contracts  
binding on  
successors.

45 & 46  
Vict. c. 38,  
**§ 31.**

Directions  
by Court

(3.) The Court may, on the application of the tenant for life, or any such successor, or of any person interested in any contract, give directions respecting the enforcing, carrying into effect, varying, or rescinding thereof.

(4.) Any preliminary contract under this Act for or relating to a lease shall not form part of the title or evidence of the title of any person to the lease, or to the benefit thereof.

<sup>1</sup> This section, in effect, empowers a tenant for life to make, vary, or rescind contracts for any of the purposes of the Act, and to accept a surrender of a lease, and places such contracts on the same footing as if they had been made by an owner in fee.

But after an order for sale of land under the S. E. A. 1877, the tenant for life cannot enter into a contract under this section, so as to conduct the sale out of Court (*m*).

## IX.—MISCELLANEOUS PROVISIONS.

### INVESTMENT OF TRUST MONEY.

45 & 46  
Vict. c. 38,  
**§ 32.**

Applica-  
tion of  
money  
in Court  
under  
Lands  
Clauses  
and other  
Acts.  
8 & 9 Vict.  
c. 18.  
23 & 24  
Vict. c.  
106.  
32 & 33  
Vict. c. 18.  
40 & 41  
Vict. c. 18.

**32.** Where, under an Act incorporating or applying, wholly or in part, the Lands Clauses Consolidation Acts, 1845,<sup>1</sup> 1860, and 1869, or under the Settled Estates Act, 1877, or under any other Act, public, local, personal, or private, money is at the commencement of this Act in Court, or is afterwards paid into Court, and is liable to be laid out in the purchase of land to be made subject to a settlement, then, in addition to any mode of dealing therewith authorised by the Act under which the money is in Court, that money may be invested or applied as capital money arising under this Act, on the like terms, if any, respecting costs and other things, as nearly as circumstances admit, and (notwithstanding anything in this Act) according to the same procedure, as if the modes of investment or application authorised by this Act were authorised by the Act under which the money is in Court.<sup>2</sup>

<sup>1</sup> Money paid into Court by a railway company in respect of land belonging to trustees of a charity without power of sale is money "liable to be laid out in the purchase of land to be made subject to a settlement"

(*m*) *Re Barrs-Haden*, 32 W. R. 194.

within this section, and may therefore be invested in any mode authorised by s. 21 (n).

45 & 46  
Vict. c. 38,  
**§ 32.**

So is money paid into Court in respect of settled land taken by the Commissioners of Sewers for the purpose of widening a street (o). In this case an order was made for investment in debenture stock of the G. N. R. Co.

In another case money paid into Court by a school board in respect of settled land taken by the board under the Elementary Education Act, 1870, was, on the petition of the tenant for life, paid out to the trustees, under this section and s. 22 (p).

Money paid under the L. C. C. Act for the purchase of land was ordered by the Court to be applied in building two houses on part of the estate, near a station, in order to develop a building estate, evidence being produced that this would improve the value of the estate, and would be for the benefit of all the persons interested (q).

Freehold property was devised to four trustees, of whom one was the tenant for life within s. 58 of this Act. The will did not contain a power of sale. Part of the property had been purchased by a railway company under compulsory powers, and the purchase-money paid into Court. An order was made upon petition for payment out of Court, appointing the three trustees, other than the tenant for life, trustees of the settlement for the purposes of this Act, and the money was ordered to be paid out to such trustees to be held upon the trusts of the will. And it appearing that the trustees of the will had advanced a large sum of money on mortgage including, by anticipation, a sum of money equivalent to the fund in Court, it was ordered that the three trustees appointed by the Court be at liberty to pay the fund to the four trustees of the will upon the execution by them of a declaration of trust in favour of the three trustees of so much of the principal sum secured by the mortgage as should be equivalent to the proceeds of the fund ordered to be paid out of Court (r).

<sup>2</sup> As to trust money not liable to be laid out in the purchase of land see *Fox v. Dolby* (s).

The costs of a petition under this section must be paid by the promoters of the undertaking, as in the case of an investment under the L. C. C. A. (t).

(n) *Re Byron*, 31 W. R. 517.

(o) *Re Hanbury*, 31 W. R. 784.

(p) *Re Rutland*, 31 W. R. 947.

Compare *Re Wright*, 24 Ch. D. 663;  
*Re Kemp*, 24 Ch. D. 485.

(q) *Re Lytton*, 28 S. J. 722.

(r) *Re Harrop*, 24 Ch. D. 717.

(s) W. N. (1883), 29.

(t) *Re Hanbury*, 31 W. R. 784.



45 & 46  
Vict. c. 38,  
§ 33.

Applica-  
tion of  
money in  
hands of  
trustees  
under  
powers of  
settle-  
ment.

**33.** Where, under a settlement, money is in the hands of trustees, and is liable to be laid out in the purchase of land to be made subject to the settlement,<sup>1</sup> then, in addition to such powers of dealing therewith as the trustees have independently of this Act, they may, at the option of the tenant for life,<sup>2</sup> invest or apply the same as capital money arising under this Act.

<sup>1</sup> Where money was bequeathed to trustees upon trust to purchase fee simple estates to be settled in strict settlement, it was held that they might invest it in debenture stock (*u*).

But trust-money which is not liable to be laid out in the purchase of land will not be permitted to remain invested in securities unauthorised by the settlement, merely because such securities are specified in s. 21 of the S. L. A. 1882 (*x*). Compare s. 22 (*y*).

<sup>2</sup> Where the tenant for life is an infant, this option may be exercised by the trustees (*z*).

45 & 46  
Vict. c. 38,  
§ 34.

Applica-  
tion of  
money paid  
for lease  
or rever-  
sion.

**34.** Where capital money arising under this Act is purchase money paid in respect of a lease for years, or life, or years determinable on life, or in respect of any other estate or interest in land less than the fee simple, or in respect of a reversion dependent on any such lease, estate, or interest, the trustees of the settlement or the Court, as the case may be, and in the case of the Court on the application of any party interested in that money, may, notwithstanding anything in this Act, require and cause the same to be laid out, invested, accumulated, and paid in such manner as, in the judgment of the trustees or of the Court, as the case may be, will give to the parties interested in that money the like benefit therefrom as they might lawfully have had from the lease, estate, interest, or reversion in respect whereof the money was paid, or as near thereto as may be.

This section is founded upon s. 37 of the S. E. A., 1877 (*a*).

(*u*) *Re Mackenzie*, 31 W. R. 948.  
(*x*) *Fox v. Dolby*, W. N. (1883), 29.  
(*y*) P. 494, *ante*.

(*z*) *Re Newcastle*, 24 Ch. D. 139—  
140.  
(*a*) See *Re Barber*, 18 Ch. D. 624.

SALE OF TIMBER.

**35.**—(1.) Where a tenant for life is impeachable for waste in respect of timber, and there is on the settled land timber<sup>1</sup> ripe and fit for cutting, the tenant for life, on obtaining the consent of the trustees of the settlement or an order of the Court, may cut and sell that timber, or any part thereof.

45 & 46  
Vict. c. 38,  
**§ 35.**

Cutting  
and sale of  
timber,  
and part of  
proceeds to  
be set  
aside.

(2.) Three fourth parts of the net proceeds of the sale shall be set aside as and be capital money arising under this Act, and the other fourth part shall go as rents and profits.

<sup>1</sup> Where the timber has been planted as an improvement under this Act, the tenant for life may cut it in proper thinning under s. 28 (2) (b), which prescribes no consent or order.

Compare s. 11 (c), as to mineral rents.

PROCEEDINGS FOR PROTECTION.

**36.** The Court may, if it thinks fit, approve of any action, defence, petition to Parliament, parliamentary opposition, or other proceeding taken or proposed to be taken for protection of settled land, or of any action or proceeding taken or proposed to be taken for recovery of land being or alleged to be subject to a settlement, and may direct that any costs, charges, or expenses incurred or to be incurred in relation thereto, or any part thereof, be paid out of property subject to the settlement.

45 & 46  
Vict. c. 38,  
**§ 36.**

Proceed-  
ings for  
protection  
or recovery  
of land  
settled or  
claimed as  
settled.

See section 17 of the S. E. A., 1877, and notes thereto (d).

HEIRLOOMS.

**37.**—(1.) Where personal chattels are settled on trust so as to devolve with land until a tenant in tail by purchase is born or attains the age of twenty-one years, or so as otherwise to vest in some person becoming entitled to an estate of freehold of inheritance in the land, a tenant for life of the land may sell the chattels or any of them.

45 & 46  
Vict. c. 38,  
**§ 37.**

Heirlooms.

(2.) The money arising by the sale shall be capital money arising under this Act, and shall be paid, invested, or applied

(b) P. 500, *ante*.  
(c) P. 483, *ante*.

(d) P. 420, *ante*.

45 & 46  
Vict. c. 38,  
§ 37.

and otherwise dealt with in like manner in all respects as by this Act directed with respect to other capital money arising under this Act, or may be invested in the purchase of other chattels, of the same or any other nature, which, when purchased, shall be settled and held on the same trusts, and shall devolve in the same manner as the chattels sold.

(3.) A sale or purchase of chattels under this section shall not be made without an order of the Court.

Compare s. 24 (3) (e).

Where a testator devised a mansion-house and estate and heirlooms to be considered as annexed to, and to be always kept in, the mansion-house, it was held that a summons taken out by the tenant for life for a sale of the mansion-house must ask also for a sale of the heir-looms (f).

#### X.—TRUSTEES.

45 & 46  
Vict. c. 38,  
§ 38.

Appoint-  
ment of  
trustees by  
Court.

**38.**—(1.) If at any time there are no trustees of a settlement within the definition in this Act,<sup>1</sup> or where in any other case it is expedient, for purposes of this Act, that new trustees of a settlement be appointed, the Court may, if it thinks fit, on the application<sup>2</sup> of the tenant for life or of any other person having, under the settlement, an estate or interest in the settled land, in possession, remainder, or otherwise, or, in the case of an infant, of his testamentary or other guardian, or next friend, appoint fit persons to be trustees<sup>3</sup> under the settlement for purposes of this Act.<sup>4</sup>

(2.) The persons so appointed, and the survivors and survivor of them, while continuing to be trustees or trustee, and, until the appointment of new trustees, the personal representatives or representative for the time being of the last surviving or continuing trustee, shall for purposes of this Act become and be the trustees or trustee of the settlement.

<sup>1</sup> See s. 2 (8).

<sup>2</sup> By summons in chambers in the Chancery Division (g).

<sup>3</sup> Compare with ss. 38 to 45 of this Act ss. 31 to 38 of the C. A., 1881 (h).

(e) P. 496, *ante*.

(f) *Re Brown*, W. N. (1884), 157.

(g) Sect. 46 (1), and 3, p. 514, *post*;

S. L. A. Ord. R. 2, p. 538, *post*.

(h) 44 & 45 Vict. c. 41, pp. 273 to 290, *ante*.

<sup>4</sup> "The appointment of trustees is required to impose a check upon the extensive powers conferred by the Act upon the tenant for life, and the 44th section contemplates the probability of there being differences between the trustees and the tenant for life." *Per* COTTON, L. J. (i).

45 & 46  
Vict. c. 38,  
§ 38.

The Court, therefore, will not appoint as trustee under a settlement, for the purposes of the Act, a tenant for life (k), or a solicitor of a tenant for life. (l). Who may be appointed.

Although trustees who have a power of sale exercisable on the death of the tenant for life, and not a present power, are not trustees of the settlement for the purposes of this Act, the Court will appoint them as such if they are willing and not unfit to act (n). And the same course was adopted where a purchaser raised the objection that trustees with a power of sale in consideration of ground rents or fee farm rents could not sell for a capital sum (m). Where they had been sixteen years in office, fresh affidavits of fitness were required (n).

Where an administratrix retained, *in specie*, the intestate's share of partnership lands, trustees were appointed of the interest of an infant, as next of kin, in the intestate's share of such land (o).

Where existing trustees desired to be discharged, and there was a fund in Court under the L. C. C. A., new trustees were appointed under this section, and the fund was ordered to be paid out to them under s. 32 (p).

Where trustees of a personalty settlement became entitled to real estate under a covenant to settle after acquired property, powers in the settlement to sell, call in, transfer and vary the investments of the trust funds, were held sufficient to constitute them trustees of the settlement for the purposes of the Act (q).

Where the committee of a lunatic presented a petition under s. 62 of this Act for power to grant a repairing lease, the Court appointed new trustees under this section, and ordered them to be served with the petition (r).

#### NUMBER OF TRUSTEES.

**39.**—(1.) Notwithstanding anything in this Act, capital money arising under this Act shall not be paid to fewer than two persons as trustees of a settlement, unless<sup>1</sup> the settlement authorises the receipt of capital trust money of the settlement by one trustee.

45 & 46  
Vict. c. 38,  
§ 39.

Number of  
trustees to  
act.

(i) *Re Kemp*, 24 Ch. D. 487.  
(k) *Re Harrop*, 24 Ch. D. 719.  
(l) *Re Walker*, 31 W. R. 716; *Re Kemp*, 24 Ch. D. 485; *Re Ray*, 25 Ch. D. 471; *Re Knowles*, 28 S. J. 738.  
(m) *Re Morgan*, 24 Ch. D. 114.

(n) *Re Stonely*, 27 S. J. 554.  
(o) *Re Wells*, 31 W. R. 764.  
(p) *Re Wright*, 24 Ch. D. 662.  
(q) *Re Garnett-Orme & Hargreaves*, 25 Ch. D. 595.  
(r) *Re Taylor*, 31 W. R. 596.

45 & 46  
Vict. c. 38,  
**§ 39.**

(2). Subject thereto, the provisions of this Act referring to the trustees of a settlement apply to the surviving or continuing trustees or trustee of the settlement for the time being.

<sup>1</sup> The surviving trustee of a settlement under which power is given to the trustees or trustee to act in such a manner as to constitute them "trustees of the settlement," and to receive and give receipts for capital, is within this exception and the exception in s. 45 (2) (s).

#### TRUSTEES' RECEIPTS.

45 & 46  
Vict. c. 38,  
**§ 40.**

Trustees'  
receipts.

**40.** The receipt in writing of the trustees of a settlement,<sup>1</sup> or where one trustee is empowered to act, of one trustee, or of the personal representatives or representative of the last surviving or continuing trustee, for any money or securities, paid or transferred to the trustees, trustee, representatives, or representative, as the case may be, effectually discharges the payer or transferor therefrom, and from being bound to see to the application or being answerable for any loss or misapplication thereof, and, in case of a mortgagee or other person advancing money, from being concerned to see that any money advanced by him is wanted for any purpose of this Act, or that no more than is wanted is raised.

<sup>1</sup> In future settlements it will be well to insert a provision to the effect that the trustees or trustee for the time being of the settlement shall be deemed trustees thereof for the purposes of the S. L. A. 1882, and (if it is so desired) that the receipt of one trustee only shall be a sufficient discharge for capital money arising under this Act.

#### PROTECTION OF TRUSTEES.

45 & 46  
Vict. c. 38,  
**§ 41.**

Protection  
of each  
trustee in-  
dividually.

**41.** Each person who is for the time being trustee of a settlement is answerable for what he actually receives only, notwithstanding his signing any receipt for conformity, and in respect of his own acts, receipts, and defaults only, and is not answerable in respect of those of any other trustee, or of any banker, broker, or other person, or for the insufficiency or deficiency of any securities, or for any loss not happening through his own wilful default.

(s) P. 513, *post*; *Re Garnett-Orme & Hargreaves*, 25 Ch. D. 595.

**42.** The trustees of a settlement, or any of them, are not liable for giving any consent,<sup>1</sup> or for not making, bringing, taking, or doing any such application,<sup>2</sup> action, proceeding, or thing, as they might make, bring, take, or do; and in case of purchase of land with capital money arising under this Act, or of an exchange, partition, or lease, are not liable for adopting any contract made by the tenant for life, or bound to inquire as to the propriety of the purchase, exchange, partition, or lease, or answerable as regards any price, consideration, or fine, and are not liable to see to or answerable for the investigation of the title, or answerable for a conveyance of land, if the conveyance purports to convey the land in the proper mode, or liable in respect of purchase-money paid by them by direction of the tenant for life to any person joining in the conveyance as a conveying party, or as giving a receipt for the purchase-money, or in any other character, or in respect of any other money paid by them by direction of the tenant for life on the purchase, exchange, partition, or lease.<sup>3</sup>

45 & 46  
Vict. c. 38,  
**§ 42.**

Protection  
of trustees  
generally.

<sup>1</sup> The consent of the trustees is required in the following cases:—

(a) To a sale of the principal mansion-house on the settled land, under s. 15.

(β) To the cutting of ripe timber, under s. 35.

The approval of the trustees or of the Court is also required for intended improvements under s. 26.

<sup>2</sup> Trustees may apply to the Court—

(a) Under s. 44, in case of any difference between themselves and the tenant for life as to the exercise of any of the powers of the Act;

(β) Under s. 56 (3), if a question arises or a doubt is entertained as to any conflict between the powers conferred by the Act and those of the settlement.

If they have reason to think that the tenant for life intends to sell at a gross undervalue, or otherwise to commit a fraud, they should apply to the Court (t).

It will be observed that the protection given by this section is not extended to investments by the trustees. As to this, see s. 22, and notes hereto (u).

(t) *Wheelwright v. Walker*, 23 Ch. D. 752—762. (u) P. 494, ante.

45 & 46  
Vict. c. 38,  
§ 43.

Trustees'  
reimburse-  
ment.

**43.** The trustees of a settlement may reimburse themselves or pay and discharge out of the trust property all expenses properly incurred by them.

Where settled property had been put up for sale by auction by the tenant for life under this Act, but had been withdrawn for want of a sufficient offer, and had been sold by private contract on the same day, it was held, on summons by the trustees, that the attempted sale and the actual sale must be treated as one transaction, and that one charge, according to the scale set out in Part I. of Schedule 1 of the General Order under the Solicitors' Remuneration Act, 1881, was payable out of the purchase-money to the tenant for life's solicitor for conducting the sale, including the conditions of sale, and one charge for deducing the title and completing the conveyance, including the preparation of the contract; and that the costs of the concurrence in the sale by the mortgagees of the tenant for life, and a proper sum for the auctioneer's charges, were also payable out of the purchase-money (x).

#### COURT MAY DECIDE QUESTIONS.

45 & 46  
Vict. c. 38,  
§ 44.

Reference  
of differ-  
ences to  
Court.

**44.** If at any time a difference arises between a tenant for life and the trustees of the settlement, respecting the exercise of any of the powers of this Act, or respecting any matter relating thereto, the Court may, on the application of either party,<sup>1</sup> give such directions respecting the matter in difference, and respecting the costs of the application, as the Court thinks fit.

<sup>1</sup> Applications are to be made to the Chancery Division by petition or summons (y), which, when made by the trustees, must be served on the tenant for life (z), and when made by the tenant for life, must be served on the trustees (a).

If a petition is presented without the direction of the judge, no costs beyond those of a summons will be allowed (b).

#### NOTICE TO TRUSTEES.

45 & 46  
Vict. c. 38,  
§ 45.

Notice to  
trustees.

**45.—(1.)** A tenant for life, when intending to make a sale, exchange, partition, lease, mortgage, or charge, shall give notice of his intention in that behalf to each of the trustees of the settlement, by posting registered letters, containing the notice, addressed to the trustees, severally, each at his usual

(x) *Re Beck, Re Cartington Estate*,  
24 Ch. D. 608.  
(y) Sect. 46 (1), (3).

(z) Sect. 46 (4).  
(a) S. L. A. Rules, 1882, R. 4.  
(b) *Ibid.*, R. 2, p. 638, *post*.

or last known place of abode in the United Kingdom, and shall give like notice to the solicitor for the trustees, if any such solicitor is known to the tenant for life, by posting a registered letter, containing the notice, addressed to the solicitor at his place of business in the United Kingdom, every letter under this section being posted not less than one month before the making by the tenant for life of the sale, exchange, partition, lease, mortgage, or charge, or of a contract for the same.<sup>1</sup>

45 & 46  
Vict. c. 38  
**§ 45.**

(2.) Provided that at the date of notice given the number of trustees shall not be less than two, unless a contrary intention is expressed in the settlement.<sup>2</sup>

(3.) A person dealing in good faith with the tenant for life is not concerned to inquire respecting the giving of any such notice as is required by this section.

This section has been amended by s. 5 of the S. L. A., 1884, which is as follows:—

- [5.—(1.) The notice required by section forty-five of the Act of 1882 of intention to make a sale, exchange, partition, or lease may be notice of a general intention in that behalf.
- (2.) The tenant for life is, upon request by a trustee of the settlement, to furnish to him such particulars and information as may reasonably be required by him from time to time with reference to sales, exchanges, partitions, or leases effected, or in progress, or immediately intended.
- (3.) Any trustee, by writing under his hand, may waive notice either in any particular case, or generally, and may accept less than one month's notice.
- (4.) This section applies to a notice given before, as well as to a notice given after, the passing of this Act.
- (5.) Provided that a notice, to the sufficiency of which objection has been made before the passing of this Act,<sup>3</sup> is not made sufficient by virtue of this Act.]

47 & 48  
Vict. c. 18,  
**§ 5.**

Notice  
under  
S. L. A.  
1882, may,  
as to a  
sale, ex-  
change,  
partition,  
or lease, be  
general.

<sup>1</sup> It had been held, under s. 45 of the S. L. A. 1882, that a general notice of intention to sell or lease all or any part of the estate at any time after the expiration of a month, as and when an opportunity should occur



45 & 46  
Vict. c. 38,  
**§ 45.** was not sufficient under this section, but that the notice ought to be of some particular sale in contemplation at the date of the notice (c).

<sup>2</sup> The surviving trustee of a settlement under which power is given to the trustees or trustee to act and to receive and give receipts for capital money, is within this exception and the exception in s. 39 (1) (d).

<sup>3</sup> The S. L. A., 1884, was passed on 3rd July, 1884.

# XI.—COURT ; LAND COMMISSIONERS ; PROCEDURE.

45 & 46  
Vict. c. 38,  
**§ 46.** **46.**—(1.) All matters within the jurisdiction of the Court under this Act shall, subject to the Acts regulating the Court, be assigned to the Chancery Division of the Court.

Chancery  
Division  
to act.

(2.) Payment of money into Court effectually exonerates therefrom the person making the payment.

Payment  
into Court.

(3.) Every application to the Court shall be by petition, or by summons at Chambers.

Applica-  
tions.

Service.

(4.) On an application by the trustees of a settlement notice shall be served in the first instance on the tenant for life.

(5.) On any application notice shall be served on such persons, if any, as the Court thinks fit.

Costs.

(6.) The Court shall have full power and discretion to make such order as it thinks fit respecting the costs, charges, or expenses of all or any of the parties to any application, and may, if it thinks fit, order that all or any of those costs, charges, or expenses be paid out of property subject to the settlement.

General  
rules.

39 & 40

Vict. c. 59.

44 & 45

Vict. c. 68.

(7.) General rules<sup>1</sup> for purposes of this Act shall be deemed rules of Court within section seventeen of the Appellate Jurisdiction Act, 1876, as altered by section nineteen of the Supreme Court of Judicature Act, 1881, and may be made accordingly.

Jurisdic-  
tion of  
Palatine  
Court.

(8.) The powers of the Court may, as regards land in the County Palatine of Lancaster, be exercised also by the Court of Chancery of the County Palatine ; and rules for regulating

(c) *Re Ray*, 25 Ch. D. 464.

& *Hargreaves*, 25 Ch. D. 595.

(d) P. 510, *ante*; *Re Garnett-Orme*

proceedings in that Court shall be from time to time made by the Chancellor of the Duchy of Lancaster, with the advice and consent of a judge of the High Court acting in the Chancery Division, and of the Vice-Chancellor of the County Palatine.

<sup>45 & 46</sup>  
<sup>Vict. c. 38,</sup>  
§ 46.

(9.) General rules, and rules for the Court of Chancery of the County Palatine, may be made at any time after the passing of this Act, to take effect on or after the commencement of this Act.

(10.) The powers of the Court may, as regards land not exceeding in capital value five hundred pounds, or in annual rateable value thirty pounds, and, as regards capital money arising under this Act, and securities in which the same is invested, not exceeding in amount or value five hundred pounds, and as regards personal chattels settled or to be settled, as in this Act mentioned, not exceeding in value five hundred pounds, be exercised by any County Court within the district whereof is situate any part of the land which is to be dealt with in the Court, or from which the capital money to be dealt with in the Court arises under this Act, or in connection with which the personal chattels to be dealt with in the Court are settled.

<sup>Jurisdic-</sup>  
<sup>tion of</sup>  
<sup>County</sup>  
<sup>Court.</sup>

<sup>1</sup> The rules which have been made under this section are the Settled Land Act Rules, 1882. They will be found at p. 542, *post*.

The following directions as to summonses under this section have also been given:—

Summonses under the Settled Land Act, 1882, should be entitled as directed by the rules under the said Act, and in other respects should be in the form given in Appendix L, No. 25, of the Rules of the Supreme Court, 1883.]

The address and description of the applicant and of the next friend (if any) should in all cases be stated in the summons, and if the applicant or the parties summoned apply or are summoned as trustees or in a representative capacity the fact should appear in the summons, and the rule (if any) under which the application is made should be stated therein (e).]

It has been held that a summons under the S. L. A. need not be instituted in an administration suit or action relating to the settled

(e) W. N. (1884), p. 90.

**45 & 46**  
**Vict. c. 38,**  
**§ 46.** land, pursuant to orders in which the tenant for life had been let into possession (*f*).

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**PAYMENT OF COSTS.**

**45 & 46**  
**Vict. c. 38,**  
**§ 47.**

Payment  
of costs out  
of settled  
property.

**47.** Where the Court directs that any costs, charges, or expenses be paid out of property subject to a settlement, the same shall, subject and according to the directions of the Court, be raised and paid out of capital money arising under this Act, or other money liable to be laid out in the purchase of land to be made subject to the settlement, or out of investments representing such money, or out of income of any such money or investments, or out of any accumulations of income of land, money, or investments, or by means of a sale of part of the settled land in respect whereof the costs, charges, or expenses are incurred, or of other settled land comprised in the same settlement and subject to the same limitations, or by means of a mortgage of the settled land or any part thereof, to be made by such person as the Court directs, and either by conveyance of the fee simple or other estate or interest the subject of the settlement, or by creation of a term, or otherwise, or by means of a charge on the settled land or any part thereof, or partly in one of those modes and partly in another or others, or in any such other mode as the Court thinks fit.

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**LAND COMMISSIONERS.**

**45 & 46**  
**Vict. c. 38,**  
**§ 48.**

Constitu-  
tion of  
land com-  
missioners,  
their  
powers,  
&c.  
Seal.

**48.—(1.)** The Commissioners now bearing the three several styles of the Inclosure Commissioners for England and Wales, and the Copyhold Commissioners, and the Tithe Commissioners for England and Wales, shall, by virtue of this Act, become and shall be styled the Land Commissioners for England.

**(2.)** The Land Commissioners shall cause one seal to be made with their style as given by this Act; and in the execution and discharge of any power or duty under any Act relating to the three several bodies of commissioners afore-said, they shall adopt and use the seal and style of the Land Commissioners for England, and no other.

(*f*) *Re Parry*, W. N. (1884), 43.

(3.) Nothing in the foregoing provisions of this section shall be construed as altering in any respect the powers, authorities, or duties of the Land Commissioners, or as affecting in respect of appointment, salary, pension, or otherwise any of those commissioners, in office at the passing of this Act, or any assistant commissioner, secretary, or other officer or person then in office or employed under them.

45 & 46  
Vict. c. 38,  
**§ 48.**

Saving of  
present  
powers.

(4.) All Acts of Parliament, judgments, decrees, or orders of any court, awards, deeds, and other documents, passed or made before the commencement of this Act, shall be read and have effect as if the Land Commissioners were therein mentioned instead of one or more of the three several bodies of commissioners aforesaid.

Land com-  
missioners  
to succeed  
to powers,  
&c., of  
absorbed  
commis-  
sioners.

(5.) All acts, matters, and things commenced by or under the authority of any one or more of the three several bodies of commissioners aforesaid before the commencement of this Act, and not then completed, shall and may be carried on and completed by or under the authority of the Land Commissioners; and the Land Commissioners, for the purpose of prosecuting, or defending, and carrying on any action, suit, or proceeding pending at the commencement of this Act, shall come into the place of any one or more, as the case may require, of the three several bodies of commissioners aforesaid.

(6.) The Land Commissioners shall, by virtue of this Act, have, for the purposes of any Act, public, local, personal, or private, passed or to be passed, making provision for the execution of improvements on settled land, all such powers and authorities as they have for the purposes of the Improvement of Land Act, 1864; and the provisions of the last-mentioned Act relating to their proceedings and inquiries, and to authentication of instruments, and to declarations, statements, notices, applications, forms, security for expenses, inspections, and examinations, shall extend and apply, as far as the nature and circumstances of the case admit, to acts and proceedings done or taken by or in relation to the Land Commissioners under any Act making provision as last aforesaid; and the

Power  
under  
Improve-  
ment of  
Land Act,  
1864.

45 & 46  
Vict. c. 38,  
§ 48.

provisions of any Act relating to fees or to security for costs to be taken in respect of the business transacted under the Acts administered by the three several bodies of commissioners aforesaid shall extend and apply to the business transacted by or under the direction of the Land Commissioners under any Act, public, local, personal, or private, passed or to be passed, by which any power or duty is conferred or imposed on them.

45 & 46  
Vict. c. 38,  
§ 49.

**49.**—(1) Every certificate and report approved and made by the Land Commissioners under this Act shall be filed in their office.

Filing of  
certifi-  
cates, &c.,  
of commis-  
sioners.

(2.) An office copy of any certificate or report so filed shall be delivered out of their office to any person requiring the same, on payment of the proper fee, and shall be sufficient evidence of the certificate or report whereof it purports to be a copy.

## XII.—RESTRICTIONS, SAVINGS, AND GENERAL PROVISIONS.

### POWERS INALIENABLE.

45 & 46  
Vict. c. 38,  
§ 50.

Powers  
not assign-  
able; con-  
tract not  
to exercise  
powers  
void.

**50.**—(1.) The powers under this Act of a tenant for life are not capable of assignment or release, and do not pass to a person as being, by operation of law or otherwise, an assignee of a tenant for life, and remain exerciseable by the tenant for life after and notwithstanding any assignment, by operation of law or otherwise, of his estate or interest under the settlement.

(2.) A contract by a tenant for life not to exercise any of his powers under this Act is void.

Rights of  
assignee  
for value.

(3.) But this section shall operate without prejudice to the rights of any person being an assignee for value of the estate or interest of the tenant for life;<sup>2</sup> and in that case the assignee's rights shall not be affected without his consent, except that, unless the assignee is actually in possession of the settled land or part thereof, his consent shall not be requisite for the making of leases thereof by the tenant for life, provided the

leases are made at the best rent that can reasonably be obtained, without fine, and in other respects are in conformity with this Act.<sup>1</sup>

45 & 46  
Vict. c. 38,  
**§ 50.**

(4.) This section extends to assignments made or coming into operation before or after and to acts done before or after the commencement of this Act; and in this section assignment includes assignment by way of mortgage, and any partial or qualified assignment, and any charge or incumbrance; and assignee has a meaning corresponding with that of assignment.

Retro-  
spective.

<sup>1</sup> Compare section 54 of the S. E. A., 1877 (*g*).

<sup>2</sup> In case of an assignment of his life estate by a tenant for life, the positions of the assignor and assignee appear to be as follows:—

(a) If the assignee (whether he be mortgagee or not) is not in possession, the assignor may grant a lease under this Act, but cannot sell or exchange without the consent of the assignee except subject to the estate or incumbrance of the assignee.

(β) If the assignee is in possession, the assignor cannot exercise any power under this Act without his consent, except subject to his estate or incumbrance.

Powers of  
tenant for  
life and his  
assignee.

(γ) In no case can the assignee, whether in possession or not, exercise any power under this Act.

(δ) If the assignee (not being a mortgagee) is in possession, he may grant leases under s. 46 of the S. E. A., 1877, and may apply to the Court under s. 23 of that Act for a sale.

“The object of the Act was to confer very large powers not before then existing. The title of the Act is, ‘An Act for facilitating sales and leases, and other dispositions of settled land.’ In many cases we are able to judge the object of the Legislature by the preamble. This statute has no preamble, but we may remember the state of the law to which it was intended that the Act should apply a remedy. I should draw the inference that one of the objects of the Act was to clear estates from incumbrances.” *Per BAGGALLAY, L. J. (h).*

#### ACT CANNOT BE EVADED.

**51.**—(1.) If in a settlement, will, assurance, or other instrument executed or made before or after, or partly before and partly after, the commencement of this Act a provision is inserted purporting or attempting, by way of direction, declaration or

45 & 46  
Vict. c. 38,  
**§ 51.**

Prohibi-  
tion or

(*g*) P. 455, *ante*.

(*h*) *Re Jones*, 32 W. R. 735.

45 & 46  
Vict. c. 38,  
§ 51.

limitation  
against  
exercise of  
powers  
void.

ration, or otherwise, to forbid a tenant for life to exercise any power under this Act, or attempting, or tending, or intended, by a limitation, gift, or disposition over of settled land, or by a limitation, gift, or disposition of other real or any personal property, or by the imposition of any condition, or by forfeiture, or in any other manner whatever, to prohibit or prevent him from exercising, or to induce him to abstain from exercising, or to put him into a position inconsistent with his exercising, any power under this Act, that provision, as far as it purports, or attempts, or tends, or is intended to have, or would or might have, the operation aforesaid, shall be deemed to be void.

(2.) For the purposes of this section an estate or interest limited to continue so long only as a person abstains from exercising any power shall be and take effect as an estate or interest to continue for the period for which it would continue if that person were to abstain from exercising the power, discharged from liability to determination or cesser by or on his exercising the same.

45 & 46  
Vict. c. 38,  
§ 52.

Provision  
against  
forfeiture.

52. Notwithstanding anything in a settlement, the exercise by the tenant for life of any power under this Act shall not occasion a forfeiture.

#### TENANT FOR LIFE A TRUSTEE FOR REVERSIONERS.

45 & 46  
Vict. c. 38,  
§ 53.

Tenant  
for life  
trustee for  
all parties  
interested.

53. A tenant for life shall, in exercising any power under this Act, have regard to the interests of all parties entitled under the settlement, and shall, in relation to the exercise thereof by him, be deemed to be in the position and to have the duties and liabilities of a trustee for those parties.<sup>1</sup>

<sup>1</sup> As to the position of a tenant for life, with regard to remaindermen, see and consider the judgment of BACON, V. C., in *Thomas v. Williams* (i).

“The S. L. A. gives the tenant for life an absolute power to convert the settled estate into money for any purpose whatever, even for mere caprice.” *Per* PEARSON, J. (k). It is true that “a tenant for life, in selling under the Act, must sell as fairly as trustees must sell for the tenant for life and for those in remainder.” *Per* PEARSON, J. (l).

(i) 24 Ch. D. 558.

(k) *Re Chaytor*, 25 Ch. D. 654.

(l) *Wheehwright v. Walker*, 23 Ch D. 752—762.

But unless he attempts to commit a fraud, such as selling the property for something infinitely below its real value, the Court will not restrain him from selling. The fact that the remainderman has sold his interest in the property does not give the purchaser of such remainder any right to prevent a sale (*m*).

45 & 46  
Vict. c. 38,  
**§ 53.**

A remedy for a wrongful act done by a deceased person cannot be pursued against his estate, unless property, or the proceeds or value of property, belonging to another person has been appropriated by the deceased person, and added to his estate (*n*).

#### PROTECTION OF PURCHASERS.

**54.** On a sale, exchange, partition, lease, mortgage, or charge, a purchaser, lessee, mortgagee, or other person dealing in good faith with a tenant for life shall, as against all parties entitled under the settlement, be conclusively taken to have given the best price, consideration or rent, as the case may require, that could reasonably be obtained by the tenant for life, and to have complied with all the requisitions of this Act.

45 & 46  
Vict. c. 38,  
**§ 54.**

General  
protection  
of pur-  
chasers,  
&c.

Compare s. 6 (5) (*o*).

#### EXERCISE OF POWERS.

**55.—(1.)** Powers and authorities conferred by this Act on a tenant for life or trustees or the Court or the Land Commissioners are exerciseable from time to time.

45 & 46  
Vict. c. 38,  
**§ 55.**

**(2.)** Where a power of sale, enfranchisement, exchange, partition, leasing, mortgaging, charging, or other power is exercised by a tenant for life, or by the trustees of a settlement, he and they may respectively execute, make, and do all deeds, instruments, and things necessary or proper in that behalf.

Exercise  
of powers ;  
limitation  
of pro-  
visions,  
&c.

**(3.)** Where any provision in this Act refers to sale, purchase, exchange, partition, leasing, or other dealing, or to any power, consent, payment, receipt, deed, assurance, contract, expenses, act, or transaction, the same shall be construed to extend only (unless it is otherwise expressed) to sales, purchases, exchanges, partitions, leasings, dealings, powers, consents, payments, receipts, deeds, assurances, contracts, expenses, acts, and transactions under this Act.

Provisions  
extend to  
transac-  
tions under  
the Act  
only.

(*m*) *Wheelwright v. Walker*, 23 Ch. 439.  
D. 752.

(*o*) P. 479, *ante*.

(*n*) *Phillips v. Homfray*, 24 Ch. D.



45 & 46 infant, under s. 60, to make such a sale under ss. 3 and 17, and that as  
 Vict. c. 38, this was a sale entirely under the S. L. A., no request or direction from  
 § 56. the guardians was necessary (t).

47 & 48  
 Vict. c. 18, § 6. <sup>3</sup> This section does not apply to a case where sales or leases have been  
 authorised by an order under the S. E. A. 1877. In that case the proper  
 course is to take out a summons to stay proceedings under the order (u).

Where an order for sale had been made under the S. E. A., 1877, and trustees had been appointed under this Act, KAY, J., refused to stay the sale on the suggestion that the property might be sold with less expense by the tenant for life (v).

<sup>4</sup> In consequence of the provision of s. 63, to the effect that land subject to a trust for sale is "settled land," and that the person entitled to the income is a "tenant for life," questions arose whether the consent of such tenant for life to the execution of the trust for sale was necessary. The effect of the cases decided before the passing of the S. L. A., 1884, was that, where the trustees had a discretion as to the time of sale, the consent of the person or class of persons constituting the tenant for life was necessary, but where it was the positive duty of the trustee to sell (e.g., for distribution), no such consent was necessary (x). Where there was no tenant for life, no consent was necessary (y).

Where trustees have a power of sale—as distinguished from a trust for sale—the tenant for life may sell under the S. L. A. quite independently of the powers of the settlement, if he desires to do so (z).

Where a tenant for life has power to and does direct trustees to sell, it will require a very strong case to induce the Court to interfere at the instance of a remainderman (a).

#### SAVING FOR LARGER POWERS.

45 & 46  
 Vict. c. 38, § 57. **57.**—(1.) Nothing in this Act shall preclude a settlor from  
 conferring on the tenant for life, or the trustees of the settle-  
 ment, any powers additional to or larger than those conferred  
 by this Act

Additional  
 or larger  
 powers by  
 settle-  
 ment.

(2.) Any additional or larger powers so conferred shall, as far as may be, notwithstanding anything in this Act, operate and be exerciseable in the like manner, and with all the like incidents, effects, and consequences, as if they were conferred by this Act, unless a contrary intention is expressed in the settlement.

(t) *Re Newcastle*, 24 Ch. D. 129.

(u) *Re Poole*, 32 W. R. 956.

(v) *Re Barrs Haden*, 32 W. R. 194.

(x) *Taylor v. Poncia*, 25 Ch. D. 646.

(y) *Re Earle & Webster*, 24 Ch. D. 144.

(z) *Re Chaytor*, 25 Ch. D. 651.

(a) *Thomas v. Williams*, 24 Ch. D. 558.

## XIII.—LIMITED OWNERS GENERALLY.

**58.**—(1.) Each person as follows shall, when the estate or interest of each of them is in possession,<sup>2</sup> have the powers of a tenant for life under this Act, as if each of them were a tenant for life as defined in this Act (namely):

45 & 46  
Vict. c. 38,  
**§ 58.**

Enumera-  
tion of  
other  
limited  
owners, to  
have  
powers of  
tenant for  
life.

- (i.) A tenant in tail, including a tenant in tail who is by Act of Parliament restrained from barring or defeating his estate tail, and although the reversion is in the Crown, and so that the exercise by him of his powers under this Act shall bind the Crown, but not including such a tenant in tail where the land in respect whereof he is so restrained was purchased with money provided by Parliament in consideration of public services:
- (ii.) A tenant in fee simple, with an executory limitation, gift, or disposition over, on failure of his issue, or in any other event:<sup>3</sup>
- (iii.) A person entitled to a base fee, although the reversion is in the Crown, and so that the exercise by him of his powers under this Act shall bind the Crown:
- (iv.) A tenant for years determinable on life, not holding merely under a lease at a rent:<sup>4</sup>
- (v.) A tenant for the life of another, not holding merely under a lease at a rent:
- (vi.) A tenant for his own or any other life, or for years determinable on life, whose estate is liable to cease in any event during that life, whether by expiration of the estate, or by conditional limitation, or otherwise, or to be defeated by an executory limitation, gift, or disposition over, or is subject to a trust for accumulation of income for payment of debts or other purpose:
- (vii.) A tenant in tail after possibility of issue extinct:
- (viii.) A tenant by the curtesy:<sup>1</sup>
- (ix.) A person entitled to the income of land under a trust or direction for payment thereof to him during his

45 & 46  
Vict. c. 38,  
**§ 58.**

own or any other life, whether subject to expenses of management or not, or until sale of the land, or until forfeiture of his interest therein on bankruptcy or other event.<sup>5</sup>

(2.) In every such case, the provisions of this Act referring to a tenant for life, either as conferring powers on him or otherwise, and to a settlement, and to settled land, shall extend to each of the persons aforesaid, and to the instrument under which his estate or interest arises, and to the land therein comprised.

(3.) In any such case any reference in this Act to death as regards a tenant for life shall, where necessary, be deemed to refer to the determination by death or otherwise of such estate or interest as last aforesaid.

<sup>1</sup> This section has been amended by s. 8 of the S. L. A. 1884, which is as follows :—

47 & 48  
Vict. c. 18,  
**§ 8.**

Curtesy to  
be deemed  
to arise  
under  
settle-  
ment.

[8. For the purposes of the Act of 1882 the estate of a tenant by the curtesy is to be deemed an estate arising under a settlement made by his wife.<sup>6</sup>]

<sup>2</sup> Referring to s. 58, NORTH, J., said, "I think '*possession*' there clearly means possession properly so called as distinguished from remainder or reversion, and does not draw any distinction as regards a person in possession personally or by his guardian if an infant. I think it means possession as distinguished from reversion. Then the 2nd sub-section provides for the case of 'a tenant in fee simple' in possession—that comes from the earlier words 'with an executory limitation, gift, or disposition over, on failure of his issue.' Then I should add that the interpretation clause says that '*possession* includes receipt of income,' and therefore if he is in receipt of income he is in possession" (b). "It is sufficient, in order to exercise the powers of a tenant for life, to be entitled to income, whether in actual receipt of income or not." *Per* BACON, V.-C. (c).

<sup>3</sup> An infant tenant in fee simple with an executory limitation over in case of his dying under the age of twenty-one without issue, has the powers of a tenant for life (d).

(b) *Re Morgan*, 24 Ch. D. 116.  
(c) *Re Jones*, 24 Ch. D. 586.

(d) *Re Morgan*, 24 Ch. D. 114.

<sup>4</sup> Where a testator by will, dated in 1866, gave a public house, of which he had granted a lease in 1859 for thirty years at a rent of £50, to trustees upon trust for his wife during the remainder of the term "if she should so long live," and in case of her death upon trust for sale, and the will contained a clause against alienation by the wife, PEARSON, J., held that the widow had not the powers of a tenant for life under sub-ss. 4 and 6 of section 58 (e). 45 & 46  
Vict. c. 38,  
§ 58.  
47 & 48  
Vict. c. 18,  
§ 8.

<sup>5</sup> Estates were devised to trustees for a term of 2000 years for raising £45,000 and subject thereto to other trustees, without impeachment of waste, during the life of X. with remainders over. The last mentioned trustees were to enter, manage, pay expenses of management and interest on charges amounting to £80,000 and to pay the balance of the income from the estates to X. for life. Although there was no balance and X. did not receive any income, it was held by the Court of Appeal, affirming BACON, V.-C., that X. had the powers of a tenant for life under the Act (f).

"It seems that section 58, sub-s. 9, was especially framed to meet the case where trustees have the legal estate, and also all the powers of management." *Per* COTTON, L. J. (g).

<sup>6</sup> "It may be observed that s. 58, sub-s. 9, gives the powers of a tenant for life to a tenant by the curtesy who is a person never contemplated by a settlement." *Per* COTTON, L. J. (h).

#### XIV.—INFANTS ; MARRIED WOMEN ; LUNATICS.

##### INFANTS.

**59.** Where a person, who is in his own right seised of or entitled in possession to land, is an infant, then for purposes of this Act the land is settled land, and the infant shall be deemed tenant for life thereof.<sup>1</sup> 45 & 46  
Vict. c. 38,  
§ 59.

<sup>1</sup> A partner died intestate and his administratrix retained his share of the partnership land in *specie*. One of his next of kin being an infant, the interest of such infant therein was held to be settled land under this section, so as to enable the Court to appoint new trustees under s. 38 (i). Infant absolutely entitled to be as tenant for life.

**60.** Where a tenant for life, or a person having the powers of a tenant for life under this Act, is an infant, or an infant would, if he were of full age, be a tenant for life, or have the 45 & 46  
Vict. c. 38,  
§ 60.

Tenant for life, infant.

(e) *Re Hazle*, 26 Ch. D. 428.

(f) *Re Jones*, 24 Ch. D. 583 ; 32 W. R. 735.

(g) *Re Jones*, 32 W. R. 736.

(h) *Re Jones*, 32 W. R. 736.

(i) *Re Wells*, 31 W. R. 764.

45 & 46  
Vict. c. 38,  
§ 60.

powers of a tenant for life under this Act,<sup>1</sup> the powers of a tenant for life under this Act may be exercised on his behalf by the trustees of the settlement, and if there are none, then by such person and in such manner as the Court, on the application of a testamentary or other guardian or next friend of the infant, either generally or in a particular instance, orders.

Infant  
tenant for  
life.

<sup>1</sup> Where the tenant for life is an infant, trustees may be appointed for the purposes of the Act (*j*), and they will have power to give the consent required under s. 56, sub-s. 2, from the tenant for life, to enable them to exercise the trusts of the settlement (*k*), and to join with persons entitled to other undivided shares (if any) of real estate in granting a mining lease (*l*).

Powers of  
trustees.

A testator devised real estate to trustees upon trust for his children who should survive him, and directed that in case any of them died in his lifetime, the share of such child should be held upon trust for his issue who should attain twenty-one. The third son attained twenty-one, and died, leaving two infant children. PEARSON, J., held that the infants took vested estates liable to be divested in the event of their not attaining twenty-one, and that consequently trustees to be appointed for the purposes of the Act were entitled to exercise the powers of a tenant for life under the Act in respect of the third son's share, and that the summons upon which the question as to the estates had been raised must be amended by making the infants (by next friend) joint applicants, and ordered it to be then referred to chambers for the appointment of trustees (*m*).

The widow of an intestate, as next friend and on behalf of his infant children, obtained the appointment of trustees for the purposes of the Act (*n*).

The Court can authorise trustees appointed for the purposes of this Act to sell copyhold property of an infant under this section out of Court (*o*).

"I read the 60th section—giving the trustees of the settlement who are able to exercise them the powers of the infant tenant for life under the Act—as conferring upon them a power to exercise the option for the tenant for life. I think in either case it was intended, where there was an infant, that the trustees of the settlement should be able to do whatever the infant was authorised to do under this Act." *Per* PEARSON, J. (*p*).

(*j*) *Re Morgan*, 24 Ch. D. 114.

(*k*) *Re Newcastle*, 24 Ch. D. 129.

(*l*) *Re Powell, Re Allaway, Allaway v. Oakley*, W. N. (1884), p. 67.

(*m*) *Re James*, 28 S. J. 657.

(*n*) *Re Wells*, W. N. (1883), p. 111

(*o*) *Re Price, Leighton v. Price*, 52 W. R. 1009.

(*p*) *Re Newcastle*, 24 Ch. D. 140.

**61.**—(1.) The foregoing provisions of this Act do not apply in the case of a married woman. 45 & 46  
Vict. c. 38,  
§ 61.

(2.) Where a married woman who, if she had not been a married woman, would have been a tenant for life or would have had the powers of a tenant for life under the foregoing provisions of this Act, is entitled for her separate use, or is entitled under any statute, passed or to be passed, for her separate property, or as a *feme sole*, then she, without her husband, shall have the powers of a tenant for life under this Act.<sup>1</sup> Married  
woman,  
how to be  
affected.

(3.) Where she is entitled otherwise than as aforesaid, then she and her husband together shall have the powers of a tenant for life under this Act.

(4.) The provisions of this Act referring to a tenant for life and a settlement and settled land shall extend to the married woman without her husband, or to her and her husband together, as the case may require, and to the instrument under which her estate or interest arises, and to the land therein comprised.

(5.) The married woman may execute, make, and do all deeds, instruments, and things necessary or proper for giving effect to the provisions of this section.

(6.) A restraint on anticipation in the settlement shall not prevent the exercise by her of any power under this Act.

<sup>1</sup> For statutory provisions entitling married women to property for their separate use, see the M. W. P. A. 1882, and notes thereto, pp. 353 *et seq.*

## LUNATICS.

**62.** Where a tenant for life, or a person having the powers of a tenant for life under this Act, is a lunatic, so found byquisition, the committee<sup>1</sup> of his estate may, in his name and on his behalf, under an order of the Lord Chancellor, or her person intrusted by virtue of the Queen's sign manual with the care and commitment of the custody of the persons and estates of lunatics, exercise the powers of a tenant for life under this Act; and the order may be made on the 45 & 46  
Vict. c. 38,  
§ 62.  
Tenant  
for life,  
lunatic.

**45 & 46**  
**Vict. c. 38,**  
**§ 62.** petition of any person interested in the settled land, or of the committee of the estate.

<sup>1</sup> The committee of a lunatic tenant for life cannot give a valid notice under s. 45 without the authority of the Lords Justices (*q*); and where a committee petitioned for power to grant a repairing lease for ninety-nine years, the Court held that it would be better to appoint trustees, under s. 38, for that purpose (*r*).

#### XV.—SETTLEMENT BY WAY OF TRUST FOR SALE.

**45 & 46**  
**Vict. c. 38,**  
**§ 63.**

Provision  
for case of  
trust to  
sell and  
re-invest  
in land.

**63.**—(1.) Any land, or any estate or interest in land, which under or by virtue of any deed, will, or agreement, covenant to surrender, copy of court roll, Act of Parliament, or other instrument or any number of instruments, whether made or passed before or after, or partly before and partly after, the commencement of this Act, is subject to a trust<sup>1</sup> or direction for sale of that land, estate, or interest, and for the application or disposal of the money to arise from the sale, or the income of that money, or the income of the land until sale, or any part of that money or income, for the benefit of any person for his life, or any other limited period, or for the benefit of two or more persons concurrently for any limited period, and whether absolutely, or subject to a trust for accumulation of income for payment of debts or other purpose, or to any other restriction, shall be deemed to be settled land, and the instrument or instruments under which the trust arises shall be deemed to be a settlement;<sup>2</sup> and the person for the time being beneficially entitled to the income of the land, estate, or interest aforesaid until sale, whether absolutely or subject as aforesaid, shall be deemed to be tenant for life thereof; or if two or more persons are so entitled concurrently, then those persons shall be deemed to constitute together the tenant for life thereof; and the persons, if any, who are for the time being under the settlement trustees for sale of the settled land, or having power of consent<sup>3</sup> to, or approval of, or control over the sale, or if under

(*q*) *Re Ray*, 25 Ch. D. 464.

(*r*) *Re Taylor*, 31 W. R. 596.

the settlement there are no such trustees, then the persons, if any, for the time being, who are by the settlement declared to be trustees thereof for purposes of this Act are for purposes of this Act trustees of the settlement.

45 & 46  
Vict. c. 38,  
§ 63.

(2.) In every such case the provisions of this Act referring to a tenant for life, and to a settlement, and to settled land, shall extend to the person or persons aforesaid, and to the instrument or instruments under which his or their estate or interest arises, and to the land therein comprised, subject and except as in this section provided (that is to say) :

Prior provisions of Act to extend to persons entitled to proceeds of sale.

(i.) Any reference in this Act to the predecessors or successors in title of the tenant for life, or to the remaindermen, or reversioners or other persons interested in the settled land, shall be deemed to refer to the persons interested in succession or otherwise in the money to arise from the sale of the land, or the income of that money, or the income of the land, until sale (as the case may require).

(ii.) Capital money arising under this Act from the settled land shall not be applied in the purchase of land unless such application is authorized by the settlement in the case of capital money arising thereunder from sales or other dispositions of the settled land, but may, in addition to any other mode of application authorized by this Act, be applied in any mode in which capital money arising under the settlement from any such sale or other disposition is applicable thereunder, subject to any consent required or direction given by the settlement with respect to the application of trust money of the settlement.

Capital money under s. 63 not to be invested in land unless authorized.

(iii.) Capital money arising under this Act from the settled land and the securities in which the same is invested, shall not for any purpose of disposition, transmission, or devolution, be considered as land unless the same would, if arising under the settlement from a sale or disposition of the settled land, have been so considered, and the same shall be held in trust for and shall go to the same

Capital money under s. 63 not transmissible as land.



45 & 46  
Vict. c. 38,  
§ 63.

persons successively in the same manner, and for and on the same estates, interests, and trusts as the same would have gone and been held if arising under the settlement from a sale or disposition of the settled land, and the income of such capital money and securities shall be paid or applied accordingly.

How land  
under s. 63  
to be con-  
veyed.

(iv.) Land of whatever tenure acquired under this Act by purchase, or in exchange, or on partition, shall be conveyed to and vested in the trustees of the settlement, on the trusts, and subject to the powers and provisions which, under the settlement or by reason of the exercise of any power of appointment or charging therein contained, are subsisting with respect to the settled land, or would be so subsisting if the same had not been sold, or as near thereto as circumstances permit, but so as not to increase or multiply charges or powers of charging.

What is a  
settlement  
within  
§ 63.

<sup>1</sup> X. having a power of appointment over a moiety of an estate comprising minerals, appointed to trustees upon trust for sale, investment, and accumulation, and to expend as much as should be required of the annual income arising therefrom in the maintenance and education of two infants during infancy. The power did not authorise a sale or lease of the property. KAY, J., held that the infants were tenants for life under s. 63, and authorised the trustees to concur with the owners of the other moiety in granting a mining lease for ninety-nine years under ss. 6 and 10; the sale of the moiety being postponed until the eldest infant attained twenty-one or died, or until further order (s).

In deciding whether a case is within this section, the Court looks only at the instrument creating the trust for sale, and disregards subsequent settlements of derivative shares (t).

Before the passing of the S. L. A. 1884, the question arose whether, having regard to this section and s. 56, trustees for sale could make a good title without the concurrence of their *cestuis que trustent*, or at any rate of such of them as constituted or had the powers of a tenant for life under this Act. It was held that, if there was no tenant for life, the trustees could make a good title and give receipts without any consent, as they could have done before the Act (u); and that if the trustees had

(s) *Re Powell; Re Allaway; Allaway v. Oakley*, W. N. (1884), p. 67. 144; *Re Knowles*, 28 S. J. 738.  
(u) *Re Earle and Webster*, 24 Ch. D. 144.  
(t) *Re Earle and Webster*, 24 Ch. D.

an absolute trust for sale, consent to the sale by the tenant for life was unnecessary (x).

45 & 46  
Vict. c. 38,  
§ 63.

But the effect of the section was further explained by PEARSON, J., as follows:—

Effect of  
powers of  
trustees  
for sale.

“I am quite satisfied that the Act was never intended to interfere with the performance of a positive and absolute trust vested in trustees, but I think that it was intended to prevent trustees from exercising by themselves a discretion when nothing but a discretion was vested in them, and to limit their exercise of a power given to them by saying that the power and the discretion cannot be put in force without the consent of the tenant for life; but where there is an absolute trust for sale, which trust for sale cannot be left unperformed without a breach of duty on the part of the trustees, it neither enables the tenant for life to control the execution of that trust, nor does it take away from the trustees the power of performing their duty as trustees” (y).

Notwithstanding this view, it was obvious that trustees for sale, with power to postpone such sale, would be considerably and unnecessarily hampered if they were unable to exercise the discretionary powers given to them by will or settlement without the consent of the person or class of persons constituting the tenant for life.

This state of things has been remedied by the Settled Land Act, 1884, which was passed on the 3rd of July, 1884, and is to be read and construed with the S. L. A. 1882.

Sect. 6 (1) of the S. L. A. 1884 (z), which applies to dealings before as well as after 3rd July, 1884, in effect renders unnecessary any consent not required by the terms of the settlement to the execution of trusts or powers created by settlements within the meaning of s. 63 of the S. L. A. 1882.

Sect. 7 of the S. L. A. 1884, is as follows:—

[7. With respect to the powers conferred by section sixty-three of the Act of 1882, the following provisions are to have effect:—

47 & 48  
Vict. c. 18,  
§ 7.

(i.) Those powers are not to be exercised without the leave of the Court.

(ii.) The Court may by order, in any case in which it thinks fit, give leave to exercise all or any of those powers, and the order is to name the person or persons to whom leave is given.

Powers  
given by  
s. 63 to be  
exercised  
only with  
leave of  
the Court.

(x) *Taylor v. Poncia*, 25 Ch. D. 650.

46. (z) P. 522, *ante*.

(y) *Taylor v. Poncia*, 25 Ch. D.

45 & 46  
Vict. c. 38,  
§ 63.

47 & 48  
Vict. c. 18,  
§ 7.

Effect of  
order.

Order may  
be regis-  
tered.

Applica-  
tion for  
order.

Not retro-  
spective.

- (iii.) The Court may from time to time rescind, or vary, any order made under this section, or may make any new or further order.
- (iv.) So long as an order under this section is in force, neither the trustees of the settlement, nor any person other than a person having the leave, shall execute any trust or power created by the settlement, for any purpose for which leave is by the order given, to exercise a power conferred by the Act of 1882.
- (v.) An order under this section may be registered and re-registered, as a *lis pendens*, against the trustees of the settlement named in the order, describing them on the register as "Trustees for the purposes of the Settled Land Act, 1882."
- (vi.) Any person dealing with the trustees from time to time, or with any other person acting under the trusts or powers of the settlement, is not to be affected by an order under this section, unless and until the order is duly registered, and when necessary re-registered as a *lis pendens*.
- (vii.) An application to the Court under this section may be made by the tenant for life, or by the persons who together constitute the tenant for life, within the meaning of section sixty-three of the Act of 1882.
- (viii.) An application to rescind or vary an order, or to make any new or further order under this section, may be made also by the trustees of the settlement, or by any person beneficially interested under the settlement.
- (ix.) The person or persons to whom leave is given by an order under this section, shall be deemed the proper person or persons to exercise the powers conferred by section sixty-three of the Act of 1882, and shall have, and may exercise those powers accordingly.
- (x.) This section is not to affect any dealing which has taken place before the passing of this Act, under any trust or power to which this section applies.]

## XVI.—REPEALS.

**64.**—(1.) The enactments described in the schedule to this Act are hereby repealed. 45 & 46  
Vict. c. 38,  
**§ 64.**

(2.) The repeal by this Act of any enactment shall not affect any right accrued or obligation incurred thereunder before the commencement of this Act; nor shall the same affect the validity or invalidity, or any operation, effect, or consequence, of any instrument executed or made, or of anything done or suffered, or of any order made, before the commencement of this Act; nor shall the same affect any action, proceeding, or thing then pending or uncompleted; and every such action, proceeding, and thing may be carried on and completed as if there had been no such repeal in this Act. Repeal of  
enact-  
ments in  
schedule.

As to the effect of this saving clause, see notes to s. 71 of the C. A. 1881 (a).

## XVII.—IRELAND.

**65.**—(1.) In the application of this Act to Ireland the foregoing provisions shall be modified as in this section provided. 45 & 46  
Vict. c. 38,  
**§ 65.**

(2.) The Court shall be Her Majesty's High Court of Justice in Ireland. Modifica-  
tions re-  
specting  
Ireland.

(3.) All matters within the jurisdiction of that Court shall, subject to the Acts regulating that Court, be assigned to the Chancery Division of that Court; but General Rules under this Act for Ireland may direct that those matters or any of them be assigned to the Land Judges of that Division.

(4.) Any deed inrolled under this Act shall be inrolled in the Record and Writ Office of that Division.

(5.) General Rules for purposes of this Act for Ireland shall be deemed Rules of Court within the Supreme Court of 40 & 41  
Vict. c. 57.

(a) P. 322, *ante*.

<sup>45 & 46</sup>  
<sup>Vict. c. 88,</sup>  
**§ 65.** Judicature Act (Ireland), 1877, and may be made accordingly,  
at any time after the passing of this Act, to take effect on or  
after the commencement of this Act.

(6.) The several Civil Bill Courts in Ireland shall, in addition to the jurisdiction possessed by them independently of this Act, have and exercise the power and authority exerciseable by the Court under this Act, in all proceedings where the property, the subject of the proceedings, does not exceed in capital value five hundred pounds, or in annual value thirty pounds.

<sup>40 & 41</sup>  
<sup>Vict. c. 56.</sup> (7.) The provisions of Part II. of the County Officers and Courts (Ireland) Act, 1877, relative to the equitable jurisdiction of the Civil Bill Courts, shall apply to the jurisdiction exerciseable by those Courts under this Act.

(8.) Rules and Orders for purposes of this Act, as far as it relates to the Civil Bill Courts, may be made at any time after the passing of this Act, to take effect on or after the commencement of this Act, in manner prescribed by section seventy-nine of the County Officers and Courts (Ireland) Act, 1877.

(9.) The Commissioners of Public Works in Ireland shall be substituted for the Land Commissioners.

(10.) The term for which a lease other than a building or mining lease may be granted shall be not exceeding thirty-five years.

THE SCHEDULE.

REPEALS.

23 & 24 Vict. c. 145 in part.	-	An Act to give to trustees, mort- gagees, and others, certain powers now commonly in- serted in settlements, mort- gages, and wills - - - - -	} in part; namely,—
		Parts I. and IV.  (being so much of the Act as is not repealed by the Conveyancing and Law of Property Act, 1881).	
27 & 28 Vict. c. 114 in part.	-	The Improvement of Land Act, } 1864 - - - - -	in part; namely,—
		Sections seventeen and eighteen: Section twenty-one, from “either by a party” to “benefice) or” (inclusive); and from “or if the landowner” to “minor or minors” (inclusive); and “or circumstance” (twice): Except as regards Scotland.	
40 & 41 Vict. c. 18 in part.	-	The Settled Estates Act, 1877 -	in part; namely,—
		Section seventeen.	

## THE SETTLED LAND ACT, 1884.

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47 & 48 VICT. c. 18.

*An Act to amend the Settled Land Act, 1882.*

Be it enacted, &c.

**47 & 48  
Vict. c. 18,  
§ 1.**      **1.** This Act may be cited as the Settled Land Act, 1884.

**Short title.**

**47 & 48  
Vict. c. 18,  
§ 2.**      **2.** The expression "the Act of 1882" used in this Act means the Settled Land Act, 1882.

**Interpre-  
tation.**

**47 & 48  
Vict. c. 18,  
§ 3.**      **3.** The Act of 1882 and this Act are to be read and construed together as one Act, and expressions<sup>1</sup> used in this Act are to have the same meanings as those attached by the Act of 1882 to similar expressions used therein.

**Construc-  
tion of  
Act.**

<sup>1</sup> For meanings of expressions used in the S. L. A., see s. 2 of the S. L. A., 1882, p. 472, *ante*.

**47 & 48  
Vict. c. 18,  
§ 4.**      **4.** A fine received on the grant of a lease under any power conferred by the Act of 1882 is to be deemed capital money arising under that Act.

**Fine on a  
lease to be  
capital  
money.**

See s. 1. of the S. L. A., 1882, and notes thereto, p. 480, *ante*.

5. (1.) The notice required by section forty-five of the Act of 1882 of intention to make a sale, exchange, partition, or lease may be notice of a general intention in that behalf.

47 & 48  
Vict. c. 18,  
§ 5.

(2.) The tenant for life is, upon request by a trustee of the settlement, to furnish to him such particulars and information as may reasonably be required by him from time to time with reference to sales, exchanges, partitions, or leases effected, or in progress, or immediately intended.

Notice  
under  
45 & 46  
Vict. c. 38,  
s. 45, may,  
as to a  
sale,  
exchange,  
partition,  
or lease, be  
general.

(3.) Any trustee, by writing under his hand, may waive notice either in any particular case, or generally, and may accept less than one month's notice.

(4.) This section applies to a notice given before, as well as to a notice given after, the passing of this Act.

(5.) Provided that a notice, to the sufficiency of which objection has been taken before the passing of this Act, is not made sufficient by virtue of this Act.

See s. 45 of the S. L. A., 1882, and notes thereto, pp. 512—13, *ante*.

6. (1.) In the case of a settlement within the meaning of section sixty-three of the Act of 1882, any consent not required by the terms of the settlement is not by force of anything contained in that Act to be deemed necessary to enable the trustees of the settlement, or any other person, to execute any of the trusts or powers created by the settlement.

47 & 48  
Vict. c. 18,  
§ 6.

As to con-  
sents of  
tenants for  
life.

(2.) In the case of every other settlement, not within the meaning of section sixty-three of the Act of 1882, where two or more persons together constitute the tenant for life for the purposes of that Act, then, notwithstanding anything contained in sub-section (2.) of section fifty-six of that Act, requiring the consent of all those persons, the consent of one only of those persons is by force of that section to be deemed necessary to the exercise by the trustees of the settlement, or by any other person, of any power conferred by the settlement exerciseable for any purpose provided for in that Act.

(3.) This section applies to dealings before, as well as after, the passing of this Act.

See ss. 56 and 63 of the S. L. A., 1882, pp. 522 and 530, *ante*.



47 & 48  
Vict. c. 18,  
§ 7.

Powers  
given by  
s. 63 of  
S. L. A.  
1882, to be  
exercised  
only with  
leave of the  
Court.

7. With respect to the powers conferred by section sixty-three of the Act of 1882, the following provisions are to have effect:—

- (i.) Those powers are not to be exercised without the leave of the Court.
- (ii.) The Court may by order, in any case in which it thinks fit, give leave to exercise all or any of those powers, and the order is to name the person or persons to whom leave is given.
- (iii.) The Court may from time to time rescind, or vary, any order made under this section, or may make any new or further order.
- (iv.) So long as an order under this section is in force, neither the trustees of the settlement, nor any person other than a person having the leave, shall execute any trust or power created by the settlement, for any purpose for which leave is by the order given, to exercise a power conferred by the Act of 1882.
- (v.) An order under this section may be registered and re-registered, as a *lis pendens*, against the trustees of the settlement named in the order, describing them on the register as "Trustees for the purposes of the Settled Land Act, 1882."
- (vi.) Any person dealing with the trustees from time to time, or with any other person acting under the trusts or powers of the settlement, is not to be affected by an order under this section, unless and until the order is duly registered, and when necessary re-registered, as a *lis pendens*.
- (vii.) An application to the Court under this section may be made by the tenant for life, or by the persons who together constitute the tenant for life, within the meaning of section sixty-three of the Act of 1882.
- (viii.) An application to rescind or vary an order, or to make any new or further order under this section, may be made also by the trustees of the settlement, or by any person beneficially interested under the settlement.

- (ix.) The person or persons to whom leave is given by an order under this section, shall be deemed the proper person or persons to exercise the powers conferred by section sixty-three of the Act of 1882, and shall have and may exercise those powers accordingly. 47 & 48  
Vict. c. 18,  
§ 7.
- (x.) This section is not to affect any dealing which has taken place before the passing of this Act, under any trust or power to which this section applies.

See s. 63 of the S. L. A., 1882, and notes thereto, p. 530, *ante*, *et seq.*

8. For the purposes of the Act of 1882 the estate of a tenant by the curtesy is to be deemed an estate arising under a settlement made by his wife. 47 & 48  
Vict. c. 18,  
§ 8.

See s. 58 of the S. L. A., 1882, and notes thereto, p. 526, *ante*.

Curtesy to  
be deemed  
to arise  
under  
settle-  
ment.

# THE SETTLED LAND ACT RULES, 1882.

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- |                                     |    |   |
|-------------------------------------|----|---|
| S. L. A.<br>R. 1.                   | 1. | The expression "the Act" used in these Rules means the Settled Land Act, 1882.  |
| Interpre-<br>tation.                | —  | Words defined by the Act when used in these Rules have the same meanings as in the Act.   |
|                                     | —  | The expression "the tenant for life" includes the tenant for life as defined by the Act, and any person having the powers of a tenant for life under the Act.   |
| S. L. A.<br>R. 2.                   | 2. | All applications to the Court under the Act may be made by summons in chambers; and if in any case a petition shall be presented without the direction of the judge, no further costs shall be allowed than would be allowed upon a summons.  |
| S. L. A.<br>R. 3.                   | 3. | The forms in the Appendix to these Rules are to be followed as far as possible, with such modification as the circumstances require. All summons, petitions, affidavits, and other proceedings under the Act are to be entitled according to Form 1 in the Appendix.  |
| Forms.                              |    | As to Form of Summons, see notice issued by the Chancery Registrars, p. 515, <i>ante</i> .  |
| S. L. A.<br>R. 4.                   | 4. | The persons to be served with notice of applications to the Court shall, in the first instance, be as follows:—   |
| Service.                            |    | In the case of applications by the tenant for life under ss. 15 and 34, the trustees.   |
|                                     |    | In the case of applications under s. 38, the trustees (if any) and the tenant for life, if not the applicant.   |
|                                     |    | In the case of applications under s. 44, the tenant for life or the trustees, as the case may be.   |
|                                     |    | No other person shall in the first instance be served. Except as hereinbefore provided where an application under the Act is made by any person other than the tenant for life, the tenant for life alone shall be served in the first instance.  |
| S. L. A.<br>R. 5.                   | 5. | Except in the cases mentioned in the last rule, applications by a tenant for life shall not in the first instance be served on any person.  |
| S. L. A.<br>R. 6.                   | 6. | The judge may require notice of any application under the Act to be served upon such persons as he thinks fit, and may give all necessary directions as to the persons (if any) to be served, and such directions may be added to or varied from time to time, as the case may require. Where a petition is presented, the petitioner may, after the petition has been filed, apply by summons in chambers (Appendix, |
| Judge<br>may<br>require<br>service. |    |   |

Form 23) for directions with regard to the persons on whom the petition ought to be served. If any person not already served is directed to be served with notice of an application, the application shall stand over generally, or until such time as the judge directs. The judge may in any particular case, upon such terms (if any) as he thinks fit, dispense with service upon any person upon whom, under these Rules, or under any direction of the judge, any application is to be served.

7. It shall be sufficient upon any application under the Act to verify by affidavit the title of the tenant for life and trustees or other persons interested in the application, unless the judge in any particular case requires further evidence. Such affidavit may be in the form, or to the effect of Form No. 8 in the Appendix. S. L. A.  
R. 7.  
Evidence.
8. Any sale authorised or directed by the Court under the Act shall be carried into effect out of Court, unless the judge shall otherwise order, and generally in such manner as the judge may direct. S. L. A.  
R. 8.  
Sales out  
of Court.
9. Where the Court authorises generally the tenant for life to make from time to time leases or grants for building or mining purposes under s. 10 of the Act, the order shall not direct any particular lease or grant to be settled or approved by the judge unless the judge shall consider that there is some special reason why such lease or grant should be settled or approved by him. Where the Court authorises any such lease or grant in any particular case, or where the Court authorises a lease under s. 15 of the Act, the order may either approve a lease or grant already prepared, or may direct that the lease or grant shall contain conditions specified in the order, or such conditions as may be approved by the judge at chambers without directing the lease or grant to be settled by the judge. S. L. A.  
R. 9.  
Leases  
need not  
be settled  
by judge.
10. Any person directed by the tenant for life to pay into Court any capital money arising under the Act may apply by summons at chambers for leave to pay the money into Court. (Appendix, Forms 9, 10, 11.) S. L. A.  
R. 10.
11. The summons shall be supported by an affidavit setting forth— S. L. A.  
R. 11.  
Summons  
for pay-  
ment of  
money  
into Court.
  1. The name and address of the person desiring to make the payment.
  2. The place where he is to be served with notice of any proceeding relating to the money.
  3. The amount of money to be paid into Court, and the account to the credit of which it is to be placed.
  4. The name and address of the tenant for life under the settlement by whose direction the money is to be paid into Court.
  5. The short particulars of the transaction in respect of which the money is payable.
12. The order made upon the summons for payment into Court may contain directions for investment of the money on any securities authorised by s. 21, sub-s. 1, of the Act, and for payment of the dividends to the tenant for life, either forthwith or upon production of the consent in writing of the applicant; the signature to such consent to be verified by the affidavit of a solicitor. But if the transaction in respect of which the money arises is not completed at the date of payment into Court, the money shall not, without the consent of the applicant, be ordered to be invested in any securities other than those upon which cash, under the control of the Court, may be invested. S. L. A.  
R. 12.  
Order for  
payment  
into Court.

- (Signed) SELBORNE, C.  
COLERIDGE, L. C. J.  
G. JESSEL, M. R.  
NATH. LINDLEY, L. J.  
H. MANISTY, J.  
E. FRY, J.

**In the High Court of Justice,  
Chancery Division,  
Vice-Chancellor Bacon,  
or  
Mr. Justice Chitty,**  
*[or other judge before whom the application is to be heard.]*

**In the matter of the    estate [or, of the timber upon the  
estate], situate at    , in the county of    , [or of the  
chattels], settled by a settlement made by an indenture dated the    , [or of the  
day of    , and made between    [or, by the Will of  
dated    or, as the case may be.]**  
**And in the matter of the Settled Land Act, 1882.**

## FORM II.

FORMAL PART OF SUMMONS.<sup>1</sup>

Title as in Form I.

Let all parties concerned attend at my chambers at the Royal Courts of Justice on                      day, the                      day of                      18                      , at                      o'clock in the forenoon, on the hearing of an application—

(a.) On the part of *A. B.*, the tenant for life [*or, tenant in tail, or as the case may be, describing the nature of the applicant's estate*] under the above-mentioned settlement.

*Or, (b.)* On the part of *A. B.*, the tenant for life (*or as the case may be*) under the above-mentioned settlement an infant by *X. Y.*, his testamentary guardian [*or, guardian appointed by order dated the                      , or, next friend*].

*Or, (c.)* On the part of *C. D.* and *E. F.*, the trustees of the above-mentioned settlement for the purposes of the above-mentioned Act.

*Or, (d.)* On the part of *G. H.*, the tenant for life in remainder [*or, tenant in tail in remainder, or as the case may be, describing the applicant's interest*] under the above-mentioned settlement subject to the life interest of *A. B.* [*or as the case may be*].

*Or, (e.)* On the part of *I. J.*, the purchaser of the lands [*or, the timber upon the lands, or chattels, or as the case may be*] settled by the above-mentioned settlement.

*Or, (f.)* On the part of *I. J.*, the lessee under a mining lease dated the                      18                      , granted under the powers of the above-mentioned Act of the mines and minerals under the lands settled by the above-mentioned settlement.

*Or, (g.)* On the part of *I. J.*, the mortgagee under a mortgage intended to be created under section 18 of the above-mentioned Act of the lands settled by the above-mentioned settlement.

*Or, (h.)* On the part of *K. L.*, interested under the contract hereinafter mentioned.

Dated the                      day of                      , 18                      .  
This summons was taken out by                      of                      , solicitor for the applicant.

To

(*Add the names of the persons (if any) on whom the summons is to be served.*)

## FORM III.

## SUMMONS UNDER SECTION 10 FOR GENERAL LEASING POWERS.

Title and formal parts as in Forms I. and II. *a.* or *b.*

1. That the applicant [*or in the case of an infant that the said X. Y. during the infancy of the said A. B.*], and each of his successors in title [*or in the case of an infant, each of the successors in title of the said A. B.*], being a tenant for life or having the powers of a tenant for life under the above-mentioned Act, may pursuant to section 10 of the said Act be authorised from time to time to make building [*or mining*] leases of the lands comprised in the said settlement for the term of                      years [*or in perpetuity*] on the conditions specified in the said Act [*or on other conditions than those specified in sections 7 to 9 of the said Act*].

2. That the costs of this application may be directed to be taxed as between solicitor and client, and that the same when taxed may be paid out of the property subject to the said settlement, and that for that purpose all necessary directions may be given.

*Note.*—The proposed conditions ought not, except in simple cases, to be set forth in the summons.

<sup>1</sup> See also directions as to form of summons, p. 515, *ante*.

## APPENDIX.

## FORM IV.

SUMMONS UNDER SECTIONS 10 OR 15 FOR AUTHORITY TO GRANT A PARTICULAR LEASE WHERE THE TENANT FOR LIFE HAS ENTERED INTO A CONTRACT.

Title as in Form I.

Formal parts as in Form II. *a.* or *b.*

1. That the conditional contract, dated the 18 , and made between the applicant [*or the said X. Y.*] of the one part and of the other part, for a [*building or mining*] lease to the said of the hereditaments therein mentioned for the term, and upon the conditions therein stated, may, pursuant to section 10 [*or 15*] of the above-mentioned Act be approved, and that the said *A. B.* [*or X. Y.*] may be authorised to execute a lease in pursuance of the said contract.

2. (*Add application for costs as in Form III. 2.*)

## FORM V.

SUMMONS UNDER SECTIONS 10 OR 15 FOR AUTHORITY TO GRANT A PARTICULAR LEASE WHEN NO CONTRACT HAS BEEN ENTERED INTO.

Title as in Form I.

Formal parts as in Form II. *a.* or *b.*

1. That the [*building or mining*] lease intended to be granted to of the lands [*or of the mansion house, &c.*] settled by the said settlement may, pursuant to section 10 [*or 15*] of the above-mentioned Act be approved, and that the applicant [*or the said X. Y.*] may be authorised to execute the same.

2. (*Add application for costs as in Form III. 2.*)

## FORM VI.

SUMMONS UNDER SECTIONS 15, 35, OR 37 FOR A SALE OUT OF COURT OF THE PRINCIPAL MANSION HOUSE AND DEMESNES OR OF TIMBER OR CHATELS.

Title as in Form I.

Formal parts as in Form II. *a.* or *b.*

1. That the applicant [*or in the case of an infant the said X. Y.*] may be authorised to sell the principal mansion house [*or the timber ripe and fit for cutting*] on the land [*or the furniture and chattels*] settled by the above-mentioned settlement in such manner and subject to such particulars, conditions, and provisions as he may think fit.

2. That the costs of this application may be taxed as between solicitor and client, and that *C. D.* and *E. F.*, the trustees of the said settlement, may be at liberty to pay the costs when taxed out of the proceeds of the said sale [*or, in the case of timber, out of the three-fourths of the proceeds of the said sale to be set aside as capital money arising under the said Act*], *or if this Form is not applicable as in Form III. 2.*

## FORM VII.

SUMMONS UNDER SECTIONS, 15, 35, OR 37 FOR SALE BY THE COURT OF THE PRINCIPAL MANSION HOUSE, AND DEMESNES, OR OF TIMBER OR CHATELS.

Title as in Form I.

Formal parts as in Form II. *a.* or *b.*

1. That the principal mansion house [*or the timber ripe and fit for cutting*] on the land [*or the furniture and chattels*], settled by the above-mentioned settlement, may be sold under the direction of the Court.

2. (*Application for costs as in Form III. 2.*)

## FORM VIII.

## AFFIDAVIT VERIFYING TITLE.

Title as in Form I.

I, \_\_\_\_\_ of \_\_\_\_\_ make oath and say as follows :

1. By the above-mentioned settlement the above-mentioned lands [*or* certain chattels, *shortly describing them*] stand limited to uses [*or* upon trusts] under which *A. B.* is [*or* I am] beneficially entitled in possession as tenant for life [*or* tenant in tail *or* tenant in fee simple, with an executory gift over *or as the case may be*].

2. (*If it is the fact.*) The said *A. B.* is an infant of the age of \_\_\_\_\_ years or thereabouts.

3. *C. D.* of \_\_\_\_\_ and *E. F.* of \_\_\_\_\_ are trustees under the said settlement, with a power of sale of the said lands [*or* with power of consent to *or* approval of the exercise of a power of sale of the said lands contained in the said settlement, *or* are the persons by the said settlement declared to be trustees thereof for purposes of the above-mentioned Act.]

## FORM IX.

## SUMMONS UNDER SECTION 22 BY PURCHASER FOR PAYMENT INTO COURT OF PURCHASE MONEY OF SETTLED LAND, TIMBER, OR CHATTELS.

Title as in Form I.

Formal parts as in Form II. *c.*

1. That the applicant may be at liberty to pay into Court to the credit of In the matter of the settlement, dated the \_\_\_\_\_ and made between \_\_\_\_\_ [*or* will, &c.] proceeds of sale of the *A.* estate [*or as the case may be*], and in the matter of the Settled Land Act, 1882," the sum of £ \_\_\_\_\_ on account of the purchase money of the said *A.* estate (*or as the case may be*) settled by the said settlement [*or* will, &c.]

2. That such directions may be given for the investment of the said sums when paid into Court, and the accumulation or payment of the dividends of securities, representing the same as the Court may think proper.

## FORM X.

SUMMONS UNDER SECTION 22 FOR PAYMENT INTO COURT BY LESSEE UNDER A MINING LEASE (*see* Section 11).

Title as in Form I.

Formal parts as in Form II. *f.*

That the applicant may be at liberty to pay into Court to the credit of In the matter of the settlement dated the \_\_\_\_\_ and made between \_\_\_\_\_ [*or* the will, &c.] mineral rents under lease dated the \_\_\_\_\_ and in the matter of the Settled Land Act, 1882," the sum of £ \_\_\_\_\_ being three-fourths [*or* one-fourth] of the rents payable by him under the said lease for the half-year ending the \_\_\_\_\_ less £ \_\_\_\_\_ the costs of payment into Court.

That the applicant may be at liberty on or before the \_\_\_\_\_ day of the \_\_\_\_\_ day of \_\_\_\_\_ in every year during the term created by the lease to pay into Court to the credit aforesaid, so much of the rents payable by him under the said lease as is by section 11 of the above-mentioned Act directed to be set aside as capital money arising under the said Act after deducting therefrom the costs of payment in, the amount paid in to be verified by affidavit.

That the said sum of £ \_\_\_\_\_ and all other sums to be paid into Court to the credit aforesaid may be invested in the purchase of (*name the investment*) to the credit and that the dividends on the said \_\_\_\_\_ when purchased be paid to *A. B.*, the tenant for life under the above-mentioned settlement during his life or until further order.



## FORM XI.

SUMMONS UNDER SECTION 22 FOR PAYMENT INTO COURT BY MORTGAGEE  
(see Section 18.)

Title as in Form I.

Formal parts as in Form II. *g*.

1. That the applicant may be at liberty to pay into Court to the credit of "Money advanced on mortgage of lands settled by the settlement dated the " and made between [or the will, &c.] and in the matter "of the Settled Land Act, 1882," the sum of £ being the amount agreed to be advanced by him on mortgage of the lands comprised in the above-mentioned settlement, less the costs of payment in.

2. (*Add directions for investment as in Form VIII. 2.*)

## FORM XII.

## SUMMONS UNDER SECTION 26 (1.)

Title as in Form I.

Formal parts as in Form II. *a* or *b*.

1. That the scheme left at my chambers this day for the execution of improvements on the lands settled by the above-mentioned settlement may be approved.

2. (*Add application for costs as in Form III. 2.*)

## FORM XIII.

## SUMMONS UNDER SECTION 26 SUB-SECTION (2) (ii) FOR APPOINTMENT OF AN ENGINEER OR SURVEYOR.

Title as in Form I.

Formal parts as in Form II. *a* or *b*.

1. That *M. N.* of Engineer [or Surveyor] may be approved as Engineer [or Surveyor] for the purposes of section 26 sub-section (2) (ii.) of the above-mentioned Act.

2. (*Add application for costs as in Form III. 2.*)

## FORM XIV.

## NOMINATION OF AN ENGINEER OR SURVEYOR BY THE TRUSTEES.

Title as in Form I.

We *C. D.* of and *E. F.* of the trustees of the above-mentioned settlement for the purposes of the above-mentioned Act, hereby nominate of engineer, [or surveyor], for the purposes of section 26, sub-section (2) (ii.) of the said Act.

(Signed) *C. D.*  
*E. F.*

## FORM XV.

## SUMMONS UNDER SECTION 26, SUB-SECTION (2) (iii).

Title as in Form I.

Formal parts as in Form II. *a.* or *b.*

1. That *C. D.* and *E. F.* the trustees of the above-mentioned settlement, for the purposes of the above-mentioned Act may be directed to apply the sum of £ out of the capital money arising under the said Act in their hands subject to the said settlement in payment for [*describe the work or operation.*] being [*part of*] an improvement executed upon the lands subject to the said settlement pursuant to a scheme approved by the said *C. D.* and *E. F.* under the said Act.

2. (*Add application for costs as in Form III. 2.*)

## FORM XVI.

## SUMMONS UNDER SECTION 26, SUB-SECTION 3.

Title as in Form I.

Formal parts as in Form II. *a.* or *b.*

1. That the sum of £        may be ordered to be raised out of the        in Court to the credit of        and that the same when raised may be paid to        upon his undertaking to apply the same in payment for [*describe the works or operation*] being part of an improvement executed upon the land settled by the above-mentioned settlement pursuant to the scheme approved by order dated the

2. (*Add application for costs as in Form III. 2.*)

## FORM XVII.

## SUMMONS UNDER SECTION 31.

Title as in Form I.

Formal parts as in Form II. *a.* or *b.*

1. That the applicant may be at liberty to enforce [*or carry into effect, or vary, or rescind as the case may be*] the contract entered into between the applicant of the one part, and        of the other part.

2. Or that such directions may be given relating to the said contract as the judge may think fit.

3. (*Add application for costs as in Form III. 2.*)

## FORM XVIII.

## SUMMONS UNDER SECTION 34 FOR APPLICATION OF MONEY PAID FOR A LEASE OR REVERSION.

Title as in Form I.

Formal parts as in Form II., *a.*, *b.*, or *d.*

1. That the sum of £        being the proceeds of sale of a lease for years [*or life, or a reversion, or other interest describing it*] settled by the above-mentioned settlement, may, pursuant to section 34 of the above-mentioned Act, be directed to be applied for the benefit of the parties interested under the said settlement in such manner as the Court may think fit.

2. (*Add application for costs as in Form III. 2.*)

## FORM XIX.

## SUMMONS UNDER SECTION 38 FOR THE APPOINTMENT OF NEW TRUSTEES.

Title as in Form I.

Formal parts as in Form II., *a.*, *b.*, *c.*, or *d.*

1. That *G. H.* and *I. J.* may be appointed trustees under the above-mentioned settlement for the purposes of the above-mentioned Act.

2. (*Add application for costs as in Form III. 2.*)

## FORM XX.

## SUMMONS UNDER SECTION 44.

Title as in Form I.

Formal parts as in Form II., *a.*, *b.*, or *c.*

1. That it may be declared that (*set out the declaration required*).'

2. (*Add application for costs as in Form III. 2, or as the circumstances require.*)

## FORM XXI.

## SUMMONS UNDER SECTION 56 FOR ADVICE AND DIRECTION.

Title as in Form I.

Formal parts as in Form II., a. to h.

For the opinion, advice, and direction of the judge on the following questions:—

1. Whether
2. Whether
3. Whether

*(or if the questions involve complicated facts)*

for the opinion, advice, and direction of the judge on the facts and questions submitted by the statement left in my chambers this day.

*(Add application for costs as in Form III. 2.)*

## FORM XXII.

## SUMMONS UNDER SECTION 60 FOR APPOINTMENT OF PERSONS TO EXERCISE POWERS ON BEHALF OF INFANT.

Title as in Form I.

Formal parts as in Form II. b.

1. That the powers conferred upon a tenant for life by sections 6 to 13, both inclusive, and sections 16 to 20, both inclusive, of the above-mentioned Act *(or such other powers as it is desired to exercise)* may be exercised by the said on behalf of the said during his minority.

2. *(Add application for costs as in Form III. 2.)*

## FORM XXIII.

## SUMMONS FOR DIRECTIONS AS TO SERVICE OF A PETITION.

Title as in Form I.

Formal parts as in Form II.

That directions may be given as to the persons to be served with the petition presented in the above matter on the                      day                      of                      18                      .

# THE IMPROVEMENT OF LAND ACT, 1864.

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27 & 28 VICT. c. 114.

Whereas an Act was passed in the twelfth and thirteenth years of Her present Majesty, intituled “An Act to promote the advance of private money for drainage of lands in Great Britain and Ireland,” and several companies have been incorporated by Act of Parliament, with special powers for promoting the improvement of land in Great Britain and Ireland by drainage and otherwise; and it is desirable to amend and consolidate the law relating to the improvement of land by owners of limited interests, and to enable such owners to charge their lands with money subscribed for the construction of railways and navigable canals which will permanently increase the value of such lands: Be it enacted, &c.

27 & 28  
Vict. c. 114,  
Preamble  
-----  
12 & 13  
Vict. c.  
100.

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## REPEAL OF “PRIVATE MONEY DRAINAGE ACT.”

1. The Act first above mentioned, being “The Private Money Drainage Act, 1849,” is hereby repealed, except so far as relates to any proceedings on applications pending under the said Act at the date of the passing hereof, it being the intention hereof that all such proceedings shall be worked out under the said Act, and that all charges to be made in consequence of any such proceedings shall be made and operate

27 & 28  
Vict. c. 114,  
§ 1.  
-----  
Recited  
Act 12 &  
13 Vict. c.  
100, re-  
pealed.

27 & 28  
Vict. c. 114,  
**§ 1.** under the said Act, which shall apply thereto as if this Act had never been passed: Provided also, that nothing herein contained shall affect any charge made under the said Act before the passing hereof, or any right or obligation existing or which may arise in respect of any such charge.

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MEANING OF "COMMISSIONERS."

Commissioners,  
land-  
owners, &c. And with regard to the commissioners for the execution of this Act, and other general matters, be it enacted as follows:

27 & 28  
Vict. c. 114,  
**§ 2.** **2.** By "the commissioners"<sup>1</sup> shall herein be meant, as regards lands in Great Britain, the Inclosure Commissioners for England and Wales, and as regards lands in Ireland, the Commissioners of Public Works in Ireland under an Act of the first and second years of his late majesty King William the Fourth, intituled "An Act for the extension and promotion of public works in Ireland," and an Act of the fifth and sixth years of the reign of Her present Majesty, intituled "An Act to promote drainage of lands, and improvement of navigation and water power in connection with drainage, in Ireland," and the several Acts amending the same respectively.

Interpre-  
tation of  
"the  
commis-  
sioners."  
1 & 2 Will.  
4, c. 33.  
5 & 6 Vict.  
c. 89.

<sup>1</sup> See s. 48 of the S. L. A. 1884, p. 516, *ante*, by which the "Land Commissioners for England" are constituted.

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PUBLIC MONEY DRAINAGE ACT.

27 & 28  
Vict. c. 114,  
**§ 3.** **3.** All the provisions of the Act of the ninth and tenth years of the reign of Her present Majesty, intituled "An Act to authorise the advance of public money to a limited amount to promote the improvement of land in Great Britain and Ireland by works of drainage," and of any and every other Act for the time being in force relating to any of the aforesaid commissioners, so far as the same may concern or be auxiliary to the proceedings or inquiries of the commissioners under the authority of such Acts or any of them,

Provisions  
of 9 & 10  
Vict. c.  
101, &c. to  
extend and  
be applic-  
able to  
proceed-  
ings of  
commis-  
sioners.

or the authentication of instruments, shall, except as in this Act otherwise provided, extend and be applicable to their proceedings and inquiries, and the authentication of instruments, under this Act.

27 & 28  
Vict. c.114,  
§ 3.

#### EVIDENCE BEFORE COMMISSIONERS.

4. Every assistant commissioner or inspector acting in any matter, inquiry, or proceeding by the authority and in the execution of this Act may receive declarations and statements, and examine upon declaration all such persons as may voluntarily attend before him in such matter, inquiry, or proceeding.

27 & 28  
Vict. c.114,  
§ 4.

Assistant  
commis-  
sioners  
may take  
declara-  
tions and  
examine  
witnesses.

#### FALSE EVIDENCE PUNISHABLE.

5. If any person shall wilfully give false evidence in any matter, inquiry, or proceeding under the provisions of this Act, or shall make or subscribe a false statement or declaration for the purposes of this Act, such person shall, in England or Ireland, be deemed guilty of a misdemeanour, and in Scotland of a crime and offence, and shall be punished accordingly.

27 & 28  
Vict. c.114,  
§ 5.

Punish-  
ment of  
persons  
giving  
false evi-  
dence.

#### NOTICES TO COMMISSIONERS.

6. Any notice requiring to be served upon the commissioners may be served by the same being left at or transmitted through the post, directed to their office in London.

27 & 28  
Vict. c.114,  
§ 6.

As to  
service of  
notices on  
commis-  
sioners.

#### SERVICE OF NOTICES GENERALLY.

7. In all cases in which it shall be necessary under the provisions of this Act to serve any notice upon any other person, it shall be sufficient to send such notice in a registered post letter, directed to such person at his then or last

27 & 28  
Vict. c.114,  
§ 7.

As to the  
services of

27 & 28  
Vict. c.114,  
§ 7.

—  
notices on  
other per-  
sons.

known place of residence or of business, unless the letter containing such notice shall be returned from the post office as undelivered; and if such person shall not have any place of residence or of business within Great Britain or Ireland, or if the place of business or of residence of such person cannot with due diligence be ascertained, then such notice may be served upon such other person as his representative, or be given in such other manner as the commissioners shall in such case direct or approve.

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#### MEANING OF LANDOWNER.

27 & 28  
Vict. c.114,  
§ 8.

Interpre-  
tation of  
“land-  
owner.”

In Eng-  
land.

8. The word “landowner” shall mean herein, as to lands in England, the person who shall be in the actual possession or receipt of the rents or profits of any land, whether of freehold, copyhold, customary, or other tenure, except where such person shall be a tenant for life or lives holding under a lease for life or lives not renewable, or shall be a tenant for years holding under a lease or an agreement for a lease for a term of years not renewable, whereof less than twenty-five years shall be unexpired at the time of making any application to the commissioners, without regard to the real amount of the interest of any person so excepted; and in the case where the person in the actual possession or receipt of the rents or profits of any land shall fall within the above exceptions, then the person who for the time being shall be in the actual receipt of the rent payable by the person so excepted, unless he shall also fall within the above exceptions, shall jointly with the person who shall be liable to the payment thereof, be deemed for the purposes of this Act to be the owner of such lands; and as to lands in Scotland, the word “landowner” shall denote and include every fiar, liferenter, or heir of entail who shall be in the actual possession of the land, or in receipt of the rents payable on the tacks, leases, or tenancies of the tenants in the actual possession thereof; and as to lands in Ireland, the word “landowner” shall mean such person as under the Act passed in the first and second years

In Scot-  
land.

In Ireland.

of the reign of Her present Majesty, intituled “An Act to abolish compositions for tithes in Ireland, and to substitute rentcharges in lieu thereof,” shall have the first estate of inheritance, or other estate or interest equivalent to a perpetual estate or interest therein, and also any tenant in dower or by the curtesy, or any person having under the limitations of any settlement by deed, will, Act of Parliament, or otherwise any estate for life, or other particular estate thereby created or limited out of or in any estate of inheritance, or by, out of, or in any such estate or interest as by or under the last-mentioned Act is to be deemed equivalent to a perpetual estate or interest; and as to lands in any part of the United Kingdom, the word “landowner” shall include a corporation, and also such persons as are empowered by the twenty-third section hereof.

27 & 28  
Vict. c. 114  
§ 8.  
1 & 2 Vict.  
c. 109.

Compare s. 58 of the S. L. A. 1882 (*a*), which enumerates the limited owners who have the powers of a tenant for life under that Act.

#### IMPROVEMENT OF LAND.

9. By “the improvement of land” shall herein be meant all or any of the following matters:<sup>1</sup>
1. The drainage of land, and the straightening, widening, deepening, or otherwise improving the drains, streams, and watercourses of any land:
  2. The irrigation and warping of land:
  3. The embanking and weiring of land from the sea or tidal waters, or from lakes, rivers, or streams, in a permanent manner:
  4. The inclosing of lands, and the straightening of fences and redivision of fields:
  5. The reclamation of land, including all operations necessary thereto:
  6. The making of permanent farm roads and permanent tramways and railways and navigable canals for all

27 & 28  
Vict. c. 114,  
§ 9.  
Interpre-  
tation of  
“improve-  
ment of  
land.”

(*a*) P. 525, *ante*.



27 & 28  
Vict.c.114,  
§ 9.

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purposes connected with the improvement of the estate :

7. The clearing of land :
8. The erection of labourers cottages, farmhouses, and other buildings required for farm purposes, and the improvement of and addition to labourers cottages, farmhouses, and other buildings for farm purposes already erected, so as such improvements or additions be of a permanent nature :
9. Planting for shelter :
10. The constructing or erecting of any engine-houses, water-wheels, saw and other mills, kilns, shafts, wells, ponds, tanks reservoirs, dams, leads, pipes, conduits, watercourses, bridges, weirs, sluices, flood-gates, or hatches, which will increase the value of any lands for agricultural purposes :
11. The construction or improvement of jetties or landing places on the sea coast, or on the banks of navigable rivers or lakes, for the transport of cattle, sheep, and other agricultural stock and produce, and of lime, manure, and other articles and things for agricultural purposes ; provided that the commissioners shall be satisfied that such works will add to the permanent value of the lands to be charged to an extent equal to the expense thereof :
12. The execution of all such works as in the judgment of the commissioners may be necessary for carrying into effect any matter hereinbefore mentioned, or for deriving the full benefit thereof.

<sup>1</sup> Sect. 30 of the S. L. A., 1882 (b), in effect adds to this section all such works as are specified in s. 25 of that Act (c).

The erection or permanent improvement of a mansion house is also an improvement within this Act, by virtue of s. 3 of the Limited Owners Residences Act (1870) Amendment Act, 1871 (d), which is as follows :—

(b) P. 502, *ante*.  
(c) P. 497, *ante*.

(d) 34 & 35 Vict. c. 84.

## MANSION HOUSE.

[3.—The erection of a mansion house and such other usual and necessary buildings, outhouses, and offices as are commonly appurtenant thereto and held and enjoyed therewith, and the completion of any mansion house and such appurtenances as aforesaid, and the improvement of and addition to any mansion house and such appurtenances as aforesaid already erected, and the improvement of and addition to any house which is capable of being converted into a mansion house suitable to the estate on which the same stands, so as such improvement and addition be of a permanent nature; provided that every such mansion house so erected or enlarged or converted is suitable to the estate on which it stands as a residence for the owner of such estate, shall be improvements within the meaning of the “Improvement of Land Act, 1864,” and may, subject to the provisions of the recited Act, be charged upon such estate.

27 & 28  
Vict. c. 114,

§ 9.

34 & 35  
Vict. c. 84,

§ 3.

Mansion  
house an  
“improvement.”  
(Limited  
Owners’  
Residences  
Act).

The term “estate” in this section shall include all lands upon which any of such improvements is proposed to be made, and any other lands in the neighbourhood of the same settled to the same uses.]

This Act, with the Limited Owners Residences Act, 1870, will be found at p. 611, *post*.

The making of sewage works is also an “improvement” within this Act, by virtue of s. 31 of the Public Health Act, 1875 (e), which is as follows:—

## SEWAGE WORKS.

31.—The making of works of distribution and service for the supply of sewage to lands for agricultural purposes shall be deemed an “improvement” of land, authorised by the “Improvement of Land Act, 1864,” and the provisions of that Act shall apply accordingly.]

38 & 39  
Vict. c. 55,  
§ 31.Sewage  
works an  
“improvement”

The construction of reservoirs is, under certain circumstances, also an improvement” within this Act, by virtue of s. 5 of the Limited

(P. H. Act,  
1875).

(e) 38 &amp; 39 Vict. c. 55.

27 & 28 Owners Reservoirs and Water Supply Further Facilities Act, 1877 (*f*),  
 Vict. c. 114, which is as follows :—

**§ 9.**

40 & 41

Vict. c. 31,

**§ 5.**

Reservoirs,  
 &c., an  
 “improvement.”

RESERVOIRS.

[5.—The construction or erection of reservoirs or other works of a permanent character for the supply of water to persons residing or engaged in labour on the lands on which such works are situate, or on any other lands settled to the same uses, or for the more convenient or profitable user of such lands, or for the supply of water to any sanitary or other local authority or water company, or to any manufacturer or other person, or for any one or more of such purposes, shall be deemed to be an improvement of land within the meaning of the ninth section of the Improvement of Land Act, 1864, and shall be sanctioned by the commissioners, if it can be shown to their satisfaction that such reservoirs or works for the supply of water will for any purpose effect a permanent yearly increase in the value of the lands on which they are situate, or any other lands settled to the same uses, or will be permanently productive of a yearly revenue to the owner of such lands exceeding the yearly amount proposed to be charged thereon ; and the construction of any such works shall be deemed to include the purchase by the landowner of any water right or other easement which might otherwise interfere with or prevent the construction of the same or any such supply of water as aforesaid.

In calculating whether the improvement is likely to effect a permanent increase of the yearly value of the land, or be productive of a yearly revenue to the landowner exceeding the yearly amount proposed to be charged thereon, it shall be lawful for the commissioners to take into account the value of any contract, the terms of which have been agreed upon between the landowner and any sanitary or other local authority, or water company, or manufacturer, or other persons, for the purpose of supplying such authority, company, person, or persons with water, as

well as the effect on such value or revenue of any sum expended by the landowner in the construction of the works over and above the sum proposed to be charged upon the land.

27 & 28  
Vict. c.  
114,  
**§ 9.**

When the improvement will afford a supply of water to persons residing or engaged in labour on the lands on which the proposed works will be situate, or on any other lands settled to the same uses, the commissioners may, if they think fit, sanction the improvement, although it may not be shown that the same will effect a direct yearly increase in the value of the lands, or be productive of a yearly revenue to the owner of the lands exceeding the yearly amount proposed to be charged thereon.]

40 & 41  
Vict. c. 31,  
**§ 5.**

The whole of the last mentioned Act will be found at p. 616, *post*.

#### "PERSON" INCLUDES CORPORATION.

10. The word "person" shall in this Act include companies and all other corporations.

27 & 28  
Vict. c.  
114,  
**§ 10.**

And with regard to the proceedings preliminary to the sanction of any improvements, be it enacted as follows:

Interpre-  
tation of  
"person."

#### APPLICATION TO COMMISSIONERS.

11. When any landowner shall be desirous of borrowing or raising money under this Act for the improvement of his land, he shall make an application to the commissioners to sanction the proposed improvements in such manner and on such terms and stating such particulars as the commissioners shall from time to time direct; and until the proposed improvements shall have been sanctioned by the commissioners in manner hereinafter mentioned, the application may be withdrawn or altered, or consolidated with any other application, at the pleasure of the applicant, but without prejudice to his right as hereinafter mentioned for the expenses incurred by the commissioners or their officers in consequence of his application.

27 & 28  
Vict. c.  
114,  
**§ 11.**

Proceed-  
ings pre-  
liminary to  
sanction of  
improve-  
ments.  
Applica-  
tion to  
commis-  
sioners to  
sanction  
improve-  
ments.

## JOINT APPLICATIONS.

27 & 28  
Vict. c.  
114,  
**§ 12.**  

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Joint ap-  
plication  
by several  
land-  
owners.

**12.** Any two or more landowners may, with the consent of the commissioners, join in an application to them to sanction the improvement of the lands of such landowners respectively, but the sum to be charged in pursuance of any such joint application shall be apportioned so that a separate and distinct sum may become charged on the land of each landowner.

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## ISSUE OF FORMS BY COMMISSIONERS.

27 & 28  
Vict. c.  
114,  
**§ 13.**  

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Commis-  
sioners  
may issue  
forms.

**13.** The commissioners may from time to time frame and circulate, as they shall see occasion, forms indicating the particulars of the information to be furnished to them by landowners for the purposes of this Act, and such other forms as the commissioners may deem expedient for facilitating any proceedings under this Act.

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## SECURITY FOR EXPENSES.

27 & 28  
Vict. c.  
114,  
**§ 14.**  

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Security  
for ex-  
penses.

**14.** The commissioners may require security to be given to them by the landowner, by bond, deposit, or otherwise, in such form as they may think fit, for the payment to them of the expenses which they or their officers shall incur in respect of the investigation on any application, and, if they shall issue such provisional or other sanctioning order as hereinafter mentioned, of the expenses which they or their officers shall incur in inspecting and ascertaining the due execution of the works; but unless the commissioners shall issue such absolute order as hereinafter mentioned, such payment shall not be a charge on the land to which such application relates, but shall be a debt due by the person making such application to the commissioners, and shall be recoverable by them as in the nature of a Crown debt.

## INSPECTION AND INQUIRIES.

**15.** If the commissioners shall think fit to entertain the application so made to them, they may cause the land to be inspected and examined by an assistant commissioner, or an engineer or surveyor, who shall have regard to and examine the proposals and statements contained in such application, and shall report his opinion thereon, and who shall also report whether in his judgment the proposed improvements will effect a permanent increase of the yearly value of the land exceeding the yearly amount proposed to be charged thereon in respect of the improvements applied for; and the commissioners may by themselves, or any assistant commissioner, engineer, or surveyor, make such other inquiries in relation to any such application as they shall think fit: Provided that the above requisition as to increased annual value shall not apply to any outlay proposed to be made upon or in respect of planting only.

27 & 28  
Vict. c.  
114,  
**§ 15.**

Inspection  
by commis-  
sioners.

The amount proposed to be expended on each contemplated work must be stated in any application for the appointment of an inspector.

## ALTERATION OF SCHEME.

**16.** The commissioners shall have power to require such alterations as they shall think expedient to be made in the improvements proposed, or in the proposed mode of executing them.

27 & 28  
Vict. c.  
114,  
**§ 16.**

Alteration  
of scheme.

## ADVERTISEMENTS AND NOTICES.

**17.** Before the commissioners shall sanction any improvements, notice shall be given of the application as well by advertisement, inserted in two successive weeks in some newspaper published in the county in which the land to be improved lies, or in case there shall be no such newspaper

27 & 28  
Vict. c.  
114,  
**§ 17.**

Advertise-  
ments and

27 & 28  
 Vict. c.  
 114,  
**§ 17.** *published in such county then in some county adjoining thereto, as by a notice in writing given, where such lands are situate in England or Ireland, to every person entitled to any estate in such land, or any part thereof, in reversion or remainder, up to and inclusive of the person entitled to the first vested estate of inheritance therein, and to every person entitled to any mortgage upon such land or any part thereof, who by reasonable inquiry shall be known to be so interested, and given, where such lands are situate in Scotland, to the nearest heir or heirs of entail, not exceeding three, and to the holders of every heritable security on such lands appearing upon the records; and in such advertisements and notices respectively shall be stated the maximum amount which it is proposed to charge in respect of the improvements, and the greatest and least terms over which it is proposed that the rent-charge should be spread; and the commissioners shall not sanction the improvements until one month shall have elapsed from the publication of the second of such advertisements and the service of such notices (if any) respectively, of which publication, and of the service of all necessary notices as aforesaid, the landowner shall, if required by the commissioners, satisfy them by one or more statutory declarations made by him or on his behalf.*

*notices preliminary to sanction.*

This section and s. 18 are repealed by s. 64 of the S. L. A., 1882 (d).

As to the effect of the saving clause in that section, see notes to s. 71 of the C. A., 1881 (e).

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DISSENT FROM SCHEME.

27 & 28  
 Vict. c.  
 114,  
**§ 18.** *18. In case any person having any estate in or charge or security on the land to be improved shall within the month named in the last preceding section signify in writing to the commissioners his dissent from such application, stating therein the nature of his estate in or charge or security on*

*Power of dissent by persons in-*

(d) P. 535, ante.

(e) P. 322, ante.

such land, the commissioners shall certify such dissent to the landowner by whom the application was made, and shall not make any provisional or other order sanctioning the improvements unless or until such dissent be withdrawn, or an order be made by the High Court of Chancery in England or Ireland respectively, or by the Court of Session in Scotland, in manner hereinafter provided, authorising the commissioners to sanction the same; nor shall they make any provisional or other order sanctioning the improvement of any land in the case of which the landowner, or the husband of the landowner, shall be the father of the person or persons entitled either at law or in equity to any state in such land, or any part thereof, in reversion or remainder, up to and inclusive of the person entitled to the first vested estate of inheritance, and such person or persons, or any of them, shall be an infant or infants, or a minor or minors, unless or until such an order as hereinbefore mentioned shall be made by such Court as aforesaid.

27 & 28  
Vict. c.  
114.

**§ 18.**

interested,  
and protection of  
landowner's  
infant children.

See note to s. 17, ante.

#### NAVIGABLE RIVERS, ETC.—NOTICE OF SCHEME.

19. If the commissioners shall consider that any proposed improvement would interfere with any navigable river or canal respectively vested in or under the management or control of any commissioners, trustees, conservators, undertakers, company, or other body or individuals, or the banks thereof, or the works or conveniences thereof, or would occasion the deposit of any refuse or discharge into such river or canal of any drainage or other matter, the landowner shall give notice of the application in writing, together with a plan and section of the proposed improvement, to such commissioners, trustees, conservators, undertakers, company, or other body, or individuals; and in case they shall, within one month after the date of such notice, signify in writing to the commissioners their dissent from such application, and state the nature of

27 & 28  
Vict. c.  
114,

**§ 19.**

The same  
in case of  
navigable  
rivers and  
canals.



27 & 28  
Vict. c.  
114,  
**§ 19.**

their interest in or authority over such river or canal, the commissioners shall certify such dissent to the landowner by whom the application was made, and shall not sanction the improvement unless or until such dissent be withdrawn, or an order be made by the High Court of Chancery in England or Ireland respectively, or by the Court of Session in Scotland, in manner hereinafter provided, authorising the commissioners to sanction the improvement.

See s. 21, *post*.

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#### CHURCH LANDS—CONSENT TO SCHEME.

27 & 28  
Vict. c.  
114,  
**§ 20.**

Consents  
necessary  
in case of  
church  
lands.

**20.** When the land to which the application relates, or any part of such land, is held in right of any church, chapel, or other ecclesiastical benefice, the commissioners shall not sanction any improvement of such land, or of so much thereof as is so held, unless and until the patron of the benefice, and in England and Ireland the bishop of the diocese, and in Scotland the presbytery of the bounds, shall signify to the commissioners, by writing under their hands, their respective consents to such application.

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#### APPLICATION TO COURT.

27 & 28  
Vict. c.  
114,  
**§ 21.**

In case of  
dissent, or  
when land-  
owner's  
infant  
children  
are to be  
protected,  
Court of  
Chancery  
or Session  
may autho-  
rise com-  
missioners  
to proceed.

**21.** If and when any dissent from any such application to the commissioners for their sanction of proposed improvements shall have been notified in writing to the commissioners, *either by a party interested in the lands proposed to be improved (not being lands held in right of any church, chapel, or other ecclesiastical benefice), or<sup>2</sup> by the commissioners, trustees, company, or other body or individuals interested in any river or canal which would or might be interfered with as hereinbefore mentioned, or if the landowner, or the husband of the landowner, shall be the father of the person or persons entitled either at law or in equity to any estate in the land to be improved, or any part thereof,*

*in reversion or remainder, up to and inclusive of the person entitled to the first vested estate of inheritance, and such person or persons, or any of them, shall be an infant or infants, or a minor or minors,*<sup>2</sup> the landowner desiring such improvements may apply to the High Court of Chancery<sup>1</sup> in England or Ireland where such lands are situate in England or Ireland respectively, or to the Court of Session where such lands are situate in Scotland, for an order of such Court authorising the commissioners to entertain and proceed upon the application for such proposed improvements, notwithstanding such dissent *or circumstance*; and such application shall be made, as to lands in England, to the Master of the Rolls or any one of the Vice-Chancellors sitting at Chambers, by summons, calling on the party dissenting to show cause why such order should not be made; as to lands in Ireland, to the Master of the Rolls, by summary petition or otherwise, as he shall by any general order direct; and as to lands in Scotland, to either division of the Court of Session in time of session, or to the lord ordinary sitting on bills in time of vacation, by summary petition; and the Court or single judge, as the case may be, to whom such application shall be made, shall hear and determine such application, and for that purpose shall have power to make or direct to be made such inquiries, and receive and entertain all such statements and evidence, on oath or by affidavit, as such Court or judge may consider necessary or desirable, or as may be produced before them or him; and if upon a consideration of the circumstances such Court or judge shall be of opinion that the commissioners should entertain and proceed upon the application, an order shall be made authorising and directing them to proceed thereon, and to deal with the same according to the provisions of this Act authorising them in that behalf, notwithstanding such dissent *or circumstance* foresaid: Provided that if at any time after notification of such dissent, and before any such order shall have been made for and made as aforesaid, such dissent shall be withdrawn by a like notification in writing, it shall not be

27 & 28  
Vict. c.  
114,  
**§ 21.**

27 & 28  
Vict. c.  
114,  
**§ 21.**

necessary to make or proceed with such application, or to obtain such order.

<sup>1</sup> Now the Chancery Division of the High Court of Justice.

<sup>2</sup> The portions printed in italics are repealed, except as to Scotland, by s. 64 of the S. L. A., 1882 (*f*).

#### NOTICE OF APPLICATION TO COURT.

27 & 28  
Vict. c.  
114,  
**§ 22.**

Service of  
notice  
under pre-  
ceding  
clause.

**22.** Where any party dissenting shall be out of the jurisdiction of the Court, it shall be lawful for the Court or judge to order service to be made in such manner as such Court or judge may think fit, and upon proof to the satisfaction of such Court or judge that such party has had actual notice within a reasonable time of such intended application, it shall be lawful for such Court or judge thereupon to hear and determine such application.

#### COSTS OF APPLICATION.

27 & 28  
Vict. c.  
114,  
**§ 23.**

And costs  
may be  
given by  
the Court.

**23.** The costs of and incidental to every application under the twenty-first and twenty-second sections, and the mode in which such costs shall be settled or taxed, shall be in the discretion of the Court or judge who shall hear such application, and if such Court or judge shall so direct, the said costs shall be deemed to be part of the expenses of and incidental to the application for the proposed improvements.

#### LANDOWNERS UNDER DISABILITY.

27 & 28  
Vict. c.  
114,  
**§ 24.**

Represent-  
ation of  
persons

**24.** All husbands, guardians, tutors, committees, curators, feoffees, trustees, judicial factors, executors, and administrators shall respectively have the same rights and powers of making applications and signifying dissents, and taking other proceedings under this Act, as their respective wives, infants,

minors, lunatics, idiots, and furious or fatuous persons would have had it free from disability, or as such feoffees, trustees, judicial factors, executors, or administrators respectively would have had if the estates, charges, or interests of which they shall be such feoffees, trustees, or judicial factors, or which shall be vested in them as such executors or administrators, had been vested in them in their own right; but no guardian, tutor, committee, curator, feoffee, trustee, judicial factor, executor, or administrator shall be in anywise compelled or obliged to signify a dissent from any application under this Act, or be in anywise responsible for the consequences of such application, or of any charge made in pursuance thereof.

27 & 28  
Vict. c.  
114,  
**§ 24.**

under disability for applications and dissents under preceding clauses.

And with regard to the sanction of any improvements, and the rights arising thereunder, be it enacted as follows:

#### SANCTION BY COMMISSIONERS.

**25.** If the commissioners shall find that the proposed improvements or any part thereof, whether with or without any alterations by them required or sanctioned, would effect a permanent increase of the yearly value of the lands proposed to be improved, or of any part thereof, exceeding the yearly amount proposed to be charged thereon, they shall sanction such improvements, or such part thereof as they shall think expedient, if under the preceding sections it shall be lawful for them so to do, by an order under their hands and seal; and they shall by the same order fix the rate of interest to be allowed on the cost of the sanctioned improvements, having regard to the market value of money at the time, but such interest shall never exceed five per cent. per annum.

27 & 28  
Vict. c.  
114,  
**§ 25.**

Sanction of improvements, and rights thereunder. Commissioners order sanctioning improvements.

#### FORMS OF SANCTIONING ORDERS.

**26.** The commissioners shall from time to time prepare forms of orders for sanctioning improvements, and shall also,

27 & 28  
Vict. c.  
114.  
**§ 26.**

27 & 28  
Vict.  
c. 114,  
**§ 26.**

Forms of  
orders  
sanction-  
ing im-  
prove-  
ments to  
be pre-  
pared by  
commi-  
sioners;  
what they  
must  
contain.

whenever required by the landowner so to do, frame and entitle their said orders under this Act in such manner that they may also be and operate as provisional, sanctioning, or other corresponding orders under the respective Acts applying to any company with which he may have contracted relating to the loan or improvements in question: Provided that every order operating under this Act to sanction any improvements shall name the landowner to whom it is issued; shall express the greatest sum to be charged in addition to any costs, charges, and expenses under the fiftieth section hereof, and the rate of interest and term of years for the repayment thereof, the former not exceeding five per centum per annum, and the latter not exceeding twenty-five years; shall specify the lands on which such repayment is to be charged; and shall either express or refer to some contract or other document expressing the general scheme of the improvements to be executed.

#### FORM AND EFFECT OF PROVISIONAL ORDER.

27 & 28  
Vict.  
c. 114,  
**§ 27.**

They may  
be called  
provisional  
orders, and  
may be  
assigned  
to parties  
agreeing to  
execute  
improve-  
ments.

**27.** Every order operating under this Act alone to sanction any improvement may be in the form set forth in schedule (A.) hereto, and shall be called a provisional order, and shall, subject to the following section hereof, create in favour of the landowner named therein the title to an absolute charge on the completion of the sanctioned improvements, which title such landowner may assign, either absolutely or by way of security, to any person; and such assignment may be made by endorsement on the provisional order.

#### DEATH OF LANDOWNER.

27 & 28  
Vict.  
c. 114,  
**§ 28.**

Provision  
for death

**28.** In case of the death of any landowner, or the determination of his interest, between the date of the provisional order and the completion of the improvements sanctioned thereby, the right to complete such improvements, and to

assign the title to an absolute charge, shall pass to the succeeding landowner; but if the succeeding landowner shall not within three calendar months after his succession proceed with the works, so as to complete the same in conformity with the provisional order, the preceding landowner, or in case of his decease his executors or administrators, may complete such improvements, and shall become entitled to have the absolute charge executed to him or them. If the succeeding landowner shall complete the improvements there shall be distinct absolute charges executed to such landowner, and the preceding landowner or his personal representatives, for the outlay made by the preceding and succeeding landowners respectively, and in case of difference the commissioners shall determine the proportions; Provided that the succeeding landowner may, with the sanction of the inclosure commissioners, and after notice to the parties to whom notice was originally given, or such of them as may be living, and such other persons, if any, as the commissioners may direct, terminate the proceedings under the provisional order, on payment of the outlay and expenses made thereunder, and indemnifying the person to whom the title to the absolute charge may have been assigned. Notwithstanding the foregoing provisions, if the title to an absolute charge shall have been assigned by the preceding landowner, the assignee may complete the improvements if he shall proceed therewith within one calendar month from the time the preceding landowner ceased to be such landowner.

27 & 28  
Vict. c.  
114  
**§ 28.**

of land-  
owner  
pending  
completion  
of improve-  
ments.

#### MODIFICATION OF PROVISIONAL ORDER.

**29.** The commissioners may from time to time, on application to be made by the landowner, and after such inquiry as they shall think fit, sanction any modifications or alterations either of the scheme of the improvements or of any other matter expressed or referred to in the provisional order: Provided that no such modification or alteration shall increase

27 & 28  
Vict. c.  
114,  
**§ 29.**

Provi-  
sional  
orders may  
be modi-  
fied.

27 & 28  
Vict. c.  
114,  
**§ 29.**

the sum to be charged in respect of the improvements, or extend or curtail the term of repayment, beyond the greatest amount which it was proposed so to charge, or the greatest or least term over which it was proposed that the rentcharge should be spread, as respectively stated in the advertisement and notices hereinbefore required: Provided also, that every such modification or alteration shall require the consent of every party who, by having contracted for the execution of the improvements, or by having taken an assignment of the title to an absolute charge, or otherwise, may be interested therein; and the modifying order shall be in such form as the commissioners shall from time to time appoint, and shall be construed together with the original order as one order with respect to all rights arising thereunder after the date of the modifying order.

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And with regard to the execution of any improvements, be it enacted as follows:

#### IMPROVEMENTS --DELIVERY OF SPECIFICATION.

27 & 28  
Vict. c.  
114,  
**§ 30.**

Execution  
of improve-  
ments.  
Detailed  
specifica-  
tions to be  
delivered  
in advance.

**30.** Before the commencement of any improvements sanctioned in manner aforesaid the landowner shall deliver to the commissioners a detailed specification<sup>1</sup> thereof, and in the case of buildings and also in any other case where the same shall be required by the commissioners, a detailed plan or drawing: Provided that when it is not intended to complete the improvements within one year from the date of the provisional or other sanctioning order, the specification and plan or drawing first delivered may comprise so much only as it is intended to complete within one year from the said date, so, however, that for the works of each successive year such specification and plan or drawing as aforesaid be always delivered in advance.

<sup>1</sup> The commissioners have issued a minute containing elaborate instructions for the guidance of landowners in preparing their specifications. A copy can be obtained on application to the commissioners.

## APPROVAL OF SPECIFICATION.

**31.** The specifications and plans or drawings aforesaid shall be examined and, if necessary, the spot visited by an assistant commissioner, or an engineer or surveyor, who shall report whether in his judgment the improvements as proposed to be effected will be effected in a substantial and durable manner, and, in the case of farm buildings, whether the same, or the improvements thereof or additions thereto, will be suitable to the locality; and no improvements shall be commenced or proceeded with until the specifications and plans or drawings aforesaid shall have been approved by the commissioners; but nothing herein contained shall render necessary the re-delivery, re-examination, or re-approval of any detailed specifications, plans, or drawings which may have been delivered in connection with the application for the commissioners' sanction to the general scheme of the improvements, and may have been approved in connection with that sanction.

27 & 28  
Vict. c.  
114,  
**§ 31.**

Specifica-  
tions to be  
approved  
before  
execution  
of works.

## POWER TO PURCHASE UNDER L. C. C. A.

**32.** All persons interested in any lands adjoining or near to the land improved or proposed to be improved, and being, as to lands in England or Ireland by the provisions of "The Lands Clauses Consolidation Act, 1845," and as to lands in Scotland by provisions of "The Lands Clauses Consolidation (Scotland) Act, 1845," enabled to sell and dispose of such lands so adjoining or near, or any estate or interest therein, may, for the purpose of any improvements authorised by this Act, sell and convey or grant to the landowner whose land has been or is proposed to be improved such lands so adjoining or near, or any part thereof, or any easement, authority, or right in, through, over, or affecting the same, and any such land, easement, authority, or right so sold and conveyed or granted shall thereupon become appurtenant to or pertinent of the lands improved or proposed so to be, and with reference to

27 & 28  
Vict. c.  
114,  
**§ 32.**

Adjoining  
lands, or  
easements  
over them,  
may be  
sold for  
purpose of  
improve-  
ments, and  
conveni-  
ences over  
adjoining  
lands for  
the execu-  
tion of  
improve-  
ments con-  
tracted for.



27 & 28  
 Vict.  
 c. 114,  
**§ 32.** the improvements whereof the same was purchased, and shall be held upon and subject to the same uses, trusts, charges, and incidents; and all such persons as aforesaid may also make any agreement with the landowner, or with any person or company that shall have contracted for the actual execution of the improvements, or their respective agents, with reference to entering on, cutting through or into, or prejudicially affecting such lands so adjoining or near; and every such sale, conveyance, grant, and agreement shall be valid and effectual accordingly, and the price or consideration shall be settled by two surveyors or a surveyor to be appointed by them in manner provided by the ninth section of "The Lands Clauses Consolidation Act, 1845," or as the case may be, by the ninth section of "The Lands Clauses Consolidation (Scotland) Act, 1845," and shall be deposited as directed by the same respective sections, and thenceforth become subject to the provisions of the same respective Acts.

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#### POWERS UNDER LAND DRAINAGE ACTS.

27 & 28  
 Vict. c.  
 114,  
**§ 33.** **33.** Whenever the commissioners shall think that it may be expedient, in order to obtain or improve an outfall for draining or warping any lands under this Act, or otherwise with a view to the improvement of any lands under this Act, to enter and execute any works upon any lands adjoining or near to the land proposed to be improved, where, by reason of the objection or disability of any owner, lessee, or occupier of such land, such works could not be otherwise executed, proceedings may be taken, if the said lands shall lie in England, either under the provisions of the Act of the tenth and eleventh years of the reign of her present Majesty, chapter thirty-eight, intituled "An Act to facilitate the Drainage of Lands in England and Wales," or under those of the third part of the Land Drainage Act, 1861, and, if in Scotland, under the provisions of the Act of the tenth and eleventh years of the reign of her present Majesty, chapter one hundred and thirteen, intituled "An Act to facilitate

Works  
 necessary  
 to be made  
 on adjoining  
 lands  
 for execution  
 of improvements  
 may be made  
 under  
 certain  
 Acts.

the Drainage of Lands in Scotland," but as though in such Act the Inclosure Commissioners for England and Wales had everywhere been named in place of the sheriff; and if such proceedings shall have been taken before the sanction of the improvements in question by the commissioners under this Act, the commissioners may, by their order sanctioning such improvements, declare the works in respect of which they shall have been taken to be expedient, and such works shall then be deemed to have been authorised by the commissioners or by the sheriff, as the case may be, and the provisions of the said respective Acts shall apply to them accordingly.

27 & 28  
Vict. c.  
114,  
**§ 33.**

PROTECTION OF PROVISIONAL ORDER.

**34.** Every provisional or modifying order shall be a full authority to the landowner or successive landowners and their representatives in the respective cases hereinbefore defined, and to all persons employed by or under contract with him or them respectively, to enter upon the lands to be improved, and any adjoining or neighbouring lands acquired or authorised to be entered under either of the two last preceding sections, and to execute in and on the same, without impeachment of waste by any remainderman or reversioner, all the improvements sanctioned by the same or according to the specifications and plans or drawings approved by the commissioners, and to do, execute, and use such Acts, works, and conveniences as may be proper for making, maintaining, and using such improvements; and for the purpose of effecting any improvement under this or the said Acts it shall be lawful to get and work freestone, limestone, clay, sand, and any other mineral or substance out of the land to be improved [f]or charged, and to make roads and other ways, and to burn and make bricks, and other things to be used in effecting such improvements, and also for the same purpose to cut down and use timber or trees not planted or serving for shelter or ornament.

27 & 28  
Vict. c.  
114,  
**§ 34.**

Provi-  
sional  
order to  
protect  
from im-  
peachment  
of waste,  
and to  
authorise  
getting  
materials  
from land,  
&c.

## SAVING OF CROWN RIGHTS.

27 & 28  
Vict.  
c. 114,  
**§ 35.**  
Saving  
rights of  
the Crown.

**35.** Nothing in this Act contained shall authorise any person to purchase, take, use, or interfere with, or the commissioners to make any order with respect to any land, soil, or water, or any right in respect thereof, belonging to her Majesty in right of her crown, without the previous consent in writing of the commissioners for the time being of her Majesty's woods, forests, and land revenues, or, if the property should be under the management or control of her Majesty's Commissioners of Works and Public Buildings, without the consent in writing of such last-mentioned commissioners, which consent the said respective commissioners are hereby authorised to give; and nothing in this Act contained shall divert, alter, or affect any of the rights, powers, or estates vested in her Majesty in right of her crown.

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## SAVING—COMMISSIONERS OF WORKS.

27 & 28  
Vict. c.  
114,  
**§ 36.**  
Saving  
rights of  
the Com-  
missioners  
of Her  
Majesty's  
works, &c.

**36.** Nothing in this Act contained shall authorise any person to purchase, take, use, or interfere with, or the commissioners to make any order with respect to any land, soil, or water, or any right in respect thereof, the management or control of which may be vested in the Commissioners of her Majesty's Works and Public Buildings on behalf of or in trust for her Majesty or the public, without the consent in writing of the last mentioned commissioners, which they are hereby authorised to give.

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## SAVING—DUCHY OF CORNWALL.

27 & 28  
Vict. c.  
114,  
**§ 37.**  
Saving

**37.** Nothing in this Act contained shall authorise any person to take, use, enter upon, or interfere with any land, soil, or water, or any rights in respect thereof, belonging to the sovereign for the time being in right of the Duchy of

Cornwall, without the consent in writing of some two or more of the regular officers, of the said Duchy, or of such other persons as may be duly authorised under the provisions of "The Duchy of Cornwall Management Act, 1863," section thirty-nine, to exercise all or any of the rights, powers, privileges, and authorities by the said Act made exerciseable or otherwise for the time being exerciseable in relation to the said Duchy, or belonging to the Duke of Cornwall for the time being, without the consent of such Duke, testified in writing under the seal of the Duchy of Cornwall, first had and obtained for that purpose, or to take away, diminish, alter, prejudice, or affect any property, rights, profits, privileges, powers, or authorities vested in or enjoyed by the Duke of Cornwall for the time being, or in or by the sovereign for the time being in right of the Duchy of Cornwall.

27 & 28  
Vict. c.  
114,  
**§ 37.**

rights of  
Duchy of  
Cornwall.

SAVING—DUCHY OF LANCASTER.

**38.** Nothing in this Act contained shall authorise any person to purchase, take, use, or interfere with any lands, or water, or any right in respect thereof, belonging to her Majesty, her heirs or successors, in right of the Duchy of Lancaster, without the previous consent in writing of the Chancellor of the said Duchy of Lancaster, which consent the Chancellor is hereby authorised to give, or to take away, lessen, prejudice, or alter any of the rights, privileges, powers, or authorities vested in or enjoyed by her Majesty, her heirs or successors, in right of the said Duchy of Lancaster.

27 & 28  
Vict. c.  
114,  
**§ 38.**

Saving  
rights of  
Duchy of  
Lancaster.

SAVING—ADMIRALTY AND BOARD OF TRADE.

Nothing in this Act contained shall authorise any person to purchase, take, use, or interfere with any land, or water, or any right in respect thereof, or to take away, or prejudice, or alter any of the rights, privileges, powers,

27 & 28  
Vict. c.  
114,  
**§ 39.**

Saving

27 & 28  
 Vict. c.  
 114,  
**§ 39.**  
 rights of  
 the Admi-  
 ralty, and  
 of the  
 Board of  
 Trade.

or authorities vested in or enjoyed by the Lord High Admiral, or the commissioners for the time being for executing the office of Lord High Admiral (hereinafter designated the Admiralty), or vested in or enjoyed by the Lords of the Committee of her Majesty's Privy Council for Trade and Foreign Plantations (hereinafter designated the Board of Trade), without the previous consent of the Admiralty signified in writing under the hand of the Secretary of the Admiralty (which consent the Admiralty are hereby authorised to give), or, as the case may be, without the previous consent of the Board of Trade signified in writing under the hand of one of the Secretaries of the said Board.

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WORKS BELOW HIGH WATER MARK.

27 & 28  
 Vict. c.  
 114,  
**§ 40.**  
 Plans to be  
 deposited  
 with  
 Admiralty  
 before  
 commenc-  
 ing works  
 below high  
 water  
 mark.

**40.** With respect to any harbour, port, bay, estuary, or navigable river, or part thereof, comprised in any notice from time to time given by the Admiralty under section nine of "The Harbours Transfer Act, 1862," previously to commencing any work below high-water mark there shall be deposited at the Admiralty office plans, specifications, and working drawings thereof for the approval of the Admiralty, such approval to be signified in writing under the hand of the Secretary of the Admiralty, and with respect to all other parts where the tide flows, previously to commencing any work below high-water mark there shall be deposited at the office of the Board of Trade plans, specifications, and working drawings thereof for the approval of the Board of Trade, such approval to be signified in writing under the hand of one of the Secretaries of the said Board, and any such work shall be constructed only in accordance with such respective approval; and when any such work shall have been commenced or constructed, it shall not be lawful at any time to alter or extend the same without obtaining, previously to making any such alteration or extension, the like respective consent and approval; and if any such work shall be commenced or

completed, or be altered, extended, or constructed, contrary to the provisions of this Act, it shall be lawful for the Admiralty or the Board of Trade, as the case may require, to abate, alter, and remove the same, and to restore the site hereof to its former condition, at the cost and charge of the person or company that executed the said work, the amount of which cost and charge shall be a debt due from such person or company to the Crown, and be recoverable accordingly, with costs of suit.

27 & 28  
Vict. c.  
114,  
**§ 40.**

#### COSTS OF ADMIRALTY SURVEYOR.

**41.** If at any time or times it shall be deemed expedient the Admiralty or the Board of Trade, as the case may require, to order a local survey and examination of any bankment or work proposed to be constructed under the powers of this Act in, over, or affecting any tidal or navigable water or river, or of the intended site thereof, the landowner shall defray the costs of every such local survey and examination, and the amount thereof shall be a debt due to Her Majesty from the landowner, and if not paid upon demand shall be recovered as a debt due to the Crown, with the costs of suit, or may be recovered, with costs, as a penalty is or shall be recoverable from the landowner.

27 & 28  
Vict. c.  
114,  
**§ 41.**

Land-  
owner to  
pay ex-  
penses of  
survey  
ordered by  
Admiralty,  
or Board  
of Trade.

#### SAVING—WAR OFFICE.

**42.** Nothing in this Act contained shall authorise any person to purchase, take, use, or interfere with any land, soil, water, or any right in respect thereof, or take away, lessen, or alter any of the rights, privileges, powers, or authorities, vested in or enjoyed by Her Majesty's Principal Secretary of State for the War Department for the time being without the previous consent of the same Principal Secretary signified in writing under his hand, which consent

27 & 28  
Vict. c.  
114,  
**§ 42.**

Saving  
rights of  
Her  
Majesty's  
principal  
Secretary  
of State  
for War.

27 & 28  
 Vict. c.  
 114,  
**§ 42.**

the said Principal Secretary for the time being is hereby authorised to give.

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SAVING—COMMISSIONERS OF SEWERS.

27 & 28  
 Vict. c.  
 114,  
**§ 43.**

Rights of  
 commis-  
 sioners of  
 sewers  
 saved.

**43.** Nothing in this Act contained shall take away, lessen, prejudice, or alter any of the rights, privileges, powers, or authorities vested in or to be discharged by any commissioners of sewers appointed by any Commission under the Great Seal or under the Seal of the Duchy of Lancaster, or in or by any other lawful commission of sewers, or the commissioners appointed under any local or private Acts of Parliament for sewers or drainage; nor shall any work be done which in any way interferes with any sewers, drains, or watercourses under the control of any commissioners of sewers; and no new sewers, drains, watercourses, or works of drainage shall be made or done under the powers of this Act within the district and jurisdiction of any such commissioners, unless the same be previously approved by those commissioners; and all such works shall be carried on and completed under the direction and control of the same commissioners and their officers; and all sewers, drains, watercourses, and works of drainage made under this Act within the district and jurisdiction of any commissioners of sewers shall be and remain subject in all respects to the jurisdiction of those commissioners; and whenever any works under this Act would intersect or interfere with any sewer, drain, or watercourse under the control of any such commissioners, the person or company executing the same shall, before any such works be made, construct such proper sewers or works of drainage, and also comply with such orders and regulations, as those commissioners shall require or make to guard against injury to the drainage of the district.

SAVING—CONSERVATORS OF THAMES.

**44.** All works executed under the authority of this Act in or connected with the river Thames, or the towing-path thereof, within the jurisdiction of the Conservators of the River Thames, shall, in addition to the approval of such works by the Admiralty, so far as hereinbefore made necessary, be executed according to a plan to be approved of by such conservators, and to be deposited at their office; and such works shall be executed and performed to the satisfaction of the engineer for the time being of such conservators; and nothing herein contained shall extend to prejudice or derogate from the estates, rights, interests, liberties, privileges, or franchises of the Conservators of the River Thames, or to prohibit, defeat, alter, or diminish any power, authority, or jurisdiction which at the time of the passing of this Act the said conservators had or might lawfully claim, use, or exercise.

27 & 28  
Vict. c.  
114,  
**§ 44.**

Works  
connected  
with  
Thames to  
be exe-  
cuted  
under  
direction  
of Conser-  
vators of  
Thames.

SAVING—BOARD OF WORKS, &C.

**45.** Where any of the intended works to be done under or by virtue of this Act shall or may pass over, under, or by the side of, or so as prejudicially to interfere with, any sewer, drain, watercourse, defence, or work under the jurisdiction or control of the Metropolitan Board of Works, or of any vestry or district board constituted under the "Metropolis Local Management Act, 1855," or any sewers or works to be made or executed by any such board or vestry, or shall or may in any way prejudicially affect the sewerage or drainage of the districts under the control of any such board or vestry, the person or company executing such works shall not commence the same until he or they shall have given to the said metropolitan or district board or vestry, as the case may be, fourteen days previous notice in writing of his or their intention to execute them, by leaving such notice at the principal office of each board or vestry, as the case may be, for the time being; with a plan and section showing the course and inclination of the intended works, and other necessary particulars

27 & 28  
Vict. c.  
114,  
**§ 45.**

Metro-  
politan  
Board of  
Works,  
&c., pro-  
tected.



27 & 28  
Vict. c.  
114,  
**§ 45.**

Protection  
of Board  
of Works,  
&c.

relating thereto, and until such board or vestry respectively shall have signified their approval of the same, unless such board or vestry, as the case may be, do not signify their approval, disapproval, or other directions within fourteen days after service of the said plan, sections, and particulars as aforesaid; and such person or company shall comply with and conform to all directions and regulations of the respective board or vestry in the execution of the said works, and shall provide any new, altered, or substituted works in such manner as such board or vestry may deem necessary for the proper protection of the sewers and works hereinbefore referred to, and for preventing injury or impediment thereto by or by reason of the said intended works or any part thereof, and shall save harmless the said metropolitan or district board or vestry respectively against all and every expense to be occasioned thereby; and all such works as may be so required shall be done by or under the direction, superintendence, and control of the engineer or other officer or officers of the said metropolitan or district board or vestry, as the case may be, at the costs, charges, and expenses in all respects of the landowner; and when any new, altered, or substituted works as aforesaid, or any works of defence connected therewith, shall be completed under the provisions of this Act, the same shall thereafter be as fully and completely under the direction, jurisdiction, and control of the said boards and vestry respectively as any sewers or works now are or hereafter may be; and nothing in this Act shall extend to prejudice, diminish, alter, or take away any of the rights, powers, or authorities vested or to be vested in the said boards and vestries, or any of them, or their successors, but all such rights, powers, and authorities shall be as valid and effectual as if this Act had not been passed.

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SAVING—WATER COMPANIES, &c.

27 & 28  
Vict. c.  
114,  
**§ 46.**

Water  
companies

**46.** Nothing in this Act contained shall authorise any person to take, otherwise than by agreement, any land of any waterworks company or waterworks commissioners, or to alter

or interfere with any works or property of any such company or commissioners, without their previous consent in writing, or to authorise any person to foul or otherwise injuriously interfere with or affect any stream or supply of water which any waterworks company or waterworks commissioners are authorised to use for the purposes of their undertaking.

27 & 28  
Vict. c.  
114,  
**§ 46.**

and com-  
missioners  
protected.

SAVING—RIVERS, CANALS, &C.

**47.** All works executed under the authority of this Act in or connected with any river, canal, or inland navigation, or the banks or towing-paths or works thereof, vested in or under the jurisdiction or management of any corporation, conservators, trustees, commissioners, undertakers, or individuals, or in respect of the navigation whereon or the use whereof any such corporation, conservators, trustees, commissioners, undertakers, or individuals are entitled by virtue of any Act of Parliament to the receipt of any tolls or other dues, shall be executed according to a plan to be approved by such corporation, conservators, trustees, commissioners, undertakers, or individuals, and to be deposited at their office, and such works shall be executed, maintained and performed to the reasonable satisfaction of the engineer for the time being of such corporation, conservators, trustees, commissioners, undertakers, or individuals, and nothing in this Act contained shall prejudice or derogate from the estates, powers, rights, interests, properties, privileges, or franchises of such corporation, conservators, trustees, commissioners, undertakers, or individuals, or prohibit, defeat, alter, or diminish any right, power, authority, jurisdiction which, at the time of the passing of this Act, such corporation, conservators, trustees, commissioners, undertakers, or individuals did or might lawfully claim, use, or exercise.

27 & 28  
Vict. c.  
114,  
**§ 47.**

Rivers,  
canals, &c.,  
protected.

LAND COMMISSIONERS MAY INSPECT.

**48.** The commissioners shall, if and as they see occasion, inspect any improvements in progress under this Act to be effected by a commissioner or assistant commissioner, or an engineer or surveyor, to ascertain the due execution thereof.

27 & 28  
Vict. c.  
114,  
**§ 48.**

Commis-  
sioners may  
inspect  
works.

## CHARGES FOR IMPROVEMENTS.

And with regard to charges for improvements under this Act, be it enacted as follows :

## EXECUTION OF CHARGE.

27 & 28  
Vict. c.  
114,  
§ 49.  
Charges  
for im-  
prove-  
ments.  
Commis-  
sioners to  
execute  
charge on  
completion  
of works,  
or of some  
part  
thereof.

**49.** When the commissioners are satisfied that the improvements sanctioned by them, or some part thereof, have been properly executed, either according to the specifications and plans or drawings approved of by them, or with such deviations therefrom as in their judgment will not diminish the permanent benefit accruing from such improvements to the lands wherein they have been made, they shall execute a charge under their hands and seal upon the inheritance or fee of the lands comprised in the provisional or other sanctioning order, or some sufficient part thereof, for the sum by the same order expressed to be chargeable in respect of such improvements, if all the said improvements have been completed, or for a proportional part of such sum if a part only of the said improvements has been executed, together, in either case, with the interest by the same order expressed, and with the amount (if any) which shall have been paid in respect of the purchase of adjoining lands, or of any easement, authority, or right in, through, over, or affecting adjoining lands, with interest thereon at the like rate.

## COSTS INCLUDED IN CHARGE.

27 & 28  
Vict. c.  
114,  
§ 50.  
Expenses  
of applica-  
tion and  
certain  
contracts  
may be  
included in  
charge.

**50.** If the landowner is desirous that the inheritance or fee of the lands improved should be charged with the expenses of and incident to his application to the commissioners, or his contract with any company or person relating to the execution of the improvements, or to the advance of money for their execution, the commissioners may ascertain the amount of the costs, charges, and expenses properly incurred preparatory or in relation to and consequent on such contract, and the application to the commissioners or either of them, and may include in the principal money charged on the

inheritance or fee of such lands the amount of such costs, charges, and expenses, and of the settled or taxed costs, if any, which a Court or judge shall have ordered as aforesaid to be deemed and taken to be part of the expenses of and incident to the application for improvements, or such part thereof as the commissioners think fit; and the commissioners may also include in such principal money interest at a rate not exceeding five pounds per centum per annum on all payments forming part of the same principal money from the respective dates of such payments to that of the absolute order, but so that no interest shall be allowed on any such payment for more than six years: Provided that the total amount of the principal money to be charged on the lands improved under the provisions of this Act shall not in any case exceed that to which, in the opinion of the commissioners, the inheritance or fee of the lands improved will be probably benefited by the improvements.

27 & 28  
Vict. c.  
114,  
§ 50.

## ABSOLUTE ORDER FOR RENTCHARGE.

**51.** Every charge under this Act shall be created by way of rentcharge, payable half-yearly, extending over the term of years fixed by the provisional or other sanctioning order, and the first payment thereof to be made six months after the time when the works in respect of which the same was intended were executed to the satisfaction of the commissioners; and the payment for each half year shall be, and expressed to be, as to part thereof a repayment of a certain amount of principal money, and as to the remainder thereof payment of interest; and the charge shall be duly stamped denoting payment of the proper *ad valorem* stamp duty which would be payable on a mortgage for securing the like amount as the principal money thereby charged, and shall be an absolute order; and a copy of every such absolute order shall be authenticated by the seal of the commissioners, and shall be kept by them; and such copy, and any copy of an absolute order authenticated by their seal, shall be evidence of the contents and purport of the same absolute order.

27 & 28  
Vict. c.  
114,  
§ 51.  
The  
charges to  
be by way  
of rent-  
charge  
created by  
absolute  
order.

## FORM OF CHARGE.

27 & 28  
Vict. c.  
114,  
**§ 52.** **52.** Charges under this Act shall be made according to the Form in the Schedule (B.) hereto annexed, or as near thereto as the circumstances of the case will admit.

Charges  
may be  
made  
according  
to Form in  
Schedule  
(B).

For this form, see p. 606, *post*.

## CHARGES TO IMPROVEMENT COMPANIES.

27 & 28  
Vict. c.  
114,  
**§ 53.** **53.** Whenever, by assignment, under the twenty-sixth section hereof or otherwise, a company having power to execute or advance money for the improvement of land shall become entitled to the creation of any charge under either the forty-ninth or the seventy-eighth section hereof, the commissioners shall, if required, but subject to the provisions hereinbefore contained, create such charge in the form of, and so that it may also operate as, an absolute or other corresponding order under the Act or Acts applying to such company.

Expen-  
diture  
made  
under this  
Act may  
be charged  
under Acts  
of im-  
prove-  
ment com-  
panies.

## IMPROVEMENT COMPANIES MAY ADOPT ACT.

27 & 28  
Vict. c.  
114,  
**§ 54.** **54.** Any company authorised by Act of Parliament to execute or advance money for the improvement of land, by giving notice to the commissioners of their intention to avail themselves of any of the powers given by this Act, shall be held to have adopted the same, and thenceforth all the procedure of such company shall be carried on under and in accordance with this Act only; and any such company which shall adopt this Act as hereinbefore provided may, with the sanction of three-fourths of the shareholders present at an extraordinary meeting of the company specially convened for the purpose, execute or advance money for the execution of any improvement authorised by this Act in any part of the United Kingdom, although not so authorised by any Act or Acts relating to the company.

Improve-  
ment com-  
panies may  
exercise  
the powers  
of this Act,  
on con-  
forming to  
to its  
procedure.  
As also  
companies  
authorised  
to execute  
improve-  
ments in  
the United  
Kingdom.

ABSOLUTE ORDER CONCLUSIVE.

**55.** The execution of the absolute order by the commissioners shall be conclusive evidence in all Courts, and for all purposes, of the validity of the charge thereby expressed to be made, and no inquiry shall be permitted either into the title or estate of the landowner, or into the due performance of anything required to be done by this Act, or as to any other matter on which the validity of such charge might but for this enactment have depended.

27 & 28  
Vict. c.  
114,  
**§ 55.**

Absolute  
order to be  
conclusive  
evidence of  
charge.

REGISTRY OF CHARGES.

**56.** A memorial of every absolute order of the commissioners whereby a rentcharge is created on land in England and Wales, in pursuance of this Act, shall be registered at the office of the land registry in England, and a memorial of every absolute order of the commissioners whereby a rentcharge is created on land in Ireland, in pursuance of this Act, shall be entered in the proper office for the registration of deeds and wills, and such memorials respectively shall express and contain the date of the order, the name and address of the landowner, the particulars of the lands charged, the amount of the rentcharge, and the period during which the same shall be made payable; and the production of the absolute order, sealed with the seal of the commissioners, shall be a sufficient authority to the registrar for the entry of such memorial at the proper registry office; and all grants of rentcharges on lands in Scotland shall be registered in the general or particular register of sasines: Provided that every rentcharge to which the present clause applies shall have priority as herein declared, any law or usage to the contrary notwithstanding.

27 & 28  
Vict. c.  
114,  
**§ 56.**

Registry  
of rents-  
charge in  
Ireland,  
Middlesex,  
Yorkshire,  
and Scot-  
land.

## POWER TO BORROW.

27 & 28  
Vict. c.  
114,  
§ 57.

Land-  
owner may  
borrow the  
amount of  
certain  
public  
assess-  
ments, and  
charge  
same on in-  
heritance.

57. Whenever by or under the provisions of any Act of Parliament, Royal Charter, or Commission under the Great Seal or the Seal of the Duchy of Lancaster any public or general works of drainage or other improvements shall be required or authorised to be executed, and the cost thereof shall be directed or authorised to be assessed or charged upon the inheritance of the lands improved, then any landowner who shall, under such Act, charter, or commission, have been assessed, and shall have become liable to pay any sum of money so chargeable for or towards such works and improvements, or any of them, in respect of his land, may apply to the commissioners to sanction the money so assessed being charged upon the land in respect of which such landowner shall have been so assessed; and if the commissioners shall be satisfied that the works or improvements have been executed in accordance with the requirement or authority in such Act, charter, or commission contained, they may, after the money shall have been duly paid by such landowner, by an absolute order within the meaning of the fifty-first section hereof, charge upon the inheritance or fee of the land in respect of which such landowner shall have been so assessed the amount so assessed and paid, or such part of it as the commissioners may be willing to sanction, to be repaid with interest.

## BORROWING—FORM OF CHARGE.

27 & 28  
Vict. c.  
114,  
§ 58.

Form of  
charge  
under s.  
57.

58. Such absolute order and charge may be made in any form and for any term permitted by this Act, and all the provisions hereof shall apply thereto in the same manner and with the same effect and operation in all respects as if such order and charge had been made in respect of improvements upon the said lands executed under the powers of this Act; and if the landowner is desirous that the inheritance or fee of the said land should be charged with the costs, charges,

and expenses of and incident to the said application and order, or any contract connected therewith, the provisions of the fiftieth section hereof shall extend and apply to the present case in the same manner as to the costs, charges, and expenses of the application and contracts in the said fiftieth section mentioned.

27 & 28  
Vict.  
c. 114,  
**§ 58.**

Costs.

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EFFECT OF ABSOLUTE ORDER.

**59.** From the date of the absolute order, the grantee hereof and his executors, administrators, successors and assigns, shall have a charge on the lands therein comprised for the principal money from time to time remaining undischarged, by payment of the rent-charge, with interest, at the rates in the several cases hereinbefore respectively expressed, and such charge shall have priority over every other then existing and future charge and incumbrance affecting such lands or estates and interests respectively, whether created under the powers of any Act of Parliament or otherwise, except quit rent, Crown rents, chief rents, feu duties, ground annuals, and other charges incident to tenure, tithe communion rentcharges and teinds, charges created or to be created under any Act authorising advances of public money for the improvement of land, and any charges created under this Act or charges of prior date created under any other existing Act of Parliament authorising the charging of lands with the expense of and incident to their improvement: Provided that in case a part only of the land charged is subject to a mortgage or other incumbrance, the charge created under the authority of this Act shall have priority over the mortgage or other incumbrance only to the extent of a due proportion of the charge, when and so soon as the same shall be ascertained under and pursuant to the sixty-sixth section of this

27 & 28  
Vict. c.  
114,  
**§ 59.**

Grantee to have charge for principal money from time to time unpaid, with priority over other incumbrances.



## CHARGES ARE PERSONALTY.

27 &amp; 28

Vict. c.

114,

§ 60.

Charges to be personal property, but money authorised to be invested on real security may be invested therein, or on mortgages thereof.

**60.** Every charge under this Act shall, as regards the holder thereof, be deemed to be personal property, except that any holder of such a charge, who shall desire to extinguish the same by reuniting it to the land charged, shall have power for that purpose to direct by any deed that it shall be reunited to and merge in the beneficial interest in the said land, as if it were of the same nature and tenure therewith; but all trustees, directors, and other persons who may be directed or authorised to invest any money on real security shall (unless the contrary be provided by the instrument directing or authorising such investment) have power, at their discretion, to invest money in such charges, or on mortgages thereof.

## CHARGED LAND—INVESTMENTS BY TRUSTEES.

27 &amp; 28

Vict. c.

114,

§ 61.

Charges not to preclude trustees from investing in purchase or on mortgage of lands.

**61.** No charge on land made by any absolute order by virtue of this Act shall be deemed such an incumbrance as shall preclude a trustee of money, with power to invest the same in the purchase of land or on mortgage, from investing it in a purchase or upon a mortgage of the land so charged, unless the terms of his trust or power expressly provide that the land to be so purchased or taken in mortgage be not subject to any prior charge.

## SCOTCH ENTAILS.

27 &amp; 28

Vict. c.

114,

§ 62.

Proprietor of Scotch entailed estate may avail himself of Act, and rent-

**62.** No proprietor of an entailed estate in Scotland shall be held to have contravened the conditions of the entail by reason of his having availed himself of the provisions of this Act, and no rentcharge imposed or created on any entailed lands in Scotland under the authority of this Act shall be made use of as a ground for adjudging, selling, or evicting such lands, or any part thereof, contrary to the provisions and conditions of the entail, but every such rentcharge shall be a

good and effectual charge upon and against such entailed lands to every other effect, and upon and against the rents and profits thereof.

27 & 28  
Vict. c.  
114,  
§ 62.

charge to  
be charge  
on such  
estate.

CHARGES HOW RECOVERABLE.

**63.** Every rentcharge on land by virtue of this Act may be covered by the person or company for the time being entitled to the same, as to lands in England or Ireland, by the same means, and with the like powers, and in like manner in all respects as a rentcharge in lieu of tithes would be recoverable if charged on the same land under the Act of the seventh year of King William the Fourth for the commutation of tithes in England and Wales, or under the Act of the first and second years of the reign of Her present Majesty to abolish compositions for tithes in Ireland and to substitute rentcharges in lieu thereof, and the several Acts passed for extending the same, as the case may be, and as if such rentcharge by virtue of this Act were a rentcharge in lieu of fees made payable to such person or company under the several Acts respectively, and as to lands in Scotland by the same means and in the like manner in all respects as any feu duties or rent or annual rent or other payment out of the lands would be recoverable.

27 & 28  
Vict. c.  
114,  
§ 63.

Rent-  
charge to  
be recover-  
able as  
tithe rent-  
charge or  
feu duties.

CHARGES—INTEREST ON ARREARS.

**4.** If any rentcharge payable under this Act shall be in arrear, such arrear shall not bear interest for a longer period than six months, but interest at five pounds per centum per annum in respect of the same, for any period not exceeding six months, may be recovered in the same manner as the principal in arrear: Provided that if, at the expiration of six months from the time of any payment falling into arrear, the same shall not be upon the land charged a sufficient distress levied and satisfy the said payment and interest thereon

27 & 28  
Vict. c.  
114,  
§ 64.

Interest on  
arrears of  
rent-  
charge.

27 & 28  
Vict. c.  
114,  
**§ 64.**

for the said period of six months, together with the costs and charges of such distress, then the arrears of such payment shall continue to bear interest at the rate of five pounds per centum per annum until payment or satisfaction thereof, and such interest may be recovered in the same manner as the sum in arrear.

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#### ASSIGNMENT OF CHARGES.

27 & 28  
Vict. c.  
114,  
**§ 65.**

Assign-  
ment of  
charges.

**65.** The grantee or other person for the time being entitled to any rent-charge created under this Act may assign the same by deed duly stamped, and wherein the consideration is truly stated; and such assignment may be according to the form in Schedule (C.) to this Act annexed, or to the like effect; and all assignments made in such form, or as near thereto as the circumstances of the case will admit, shall be effectual to vest, both at law and in equity, the charge thereby assigned, and all the powers, authorities, rights, and remedies of the assignor with reference to such charge, in the assignee, his successors, executors, administrators, and assigns respectively, and notice of such assignment shall be sent to the commissioners at their office in London.

For this form, see p. 607, *post*.

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#### TENANTS FOR LIFE TO PAY CHARGES.

27 & 28  
Vict. c.  
114,  
**§ 66.**

Tenants  
for life to  
keep down  
rents-  
charge.

**66.** Every landowner on whose land a charge shall have been made under this Act, and every succeeding tenant for life, tenant in tail, and other person having a limited interest in the land so charged, shall, as between himself and the persons in remainder or reversion, be bound to pay the yearly or other periodical payments of such charge which shall become payable during the continuance of his interest; and in case he be in the actual occupation or entitled to an apportioned part of the rents and profits of such land up to the time of the termination of his interest, he shall also be

bound to pay an apportioned part of the yearly rent or other periodical payment of such charge which shall become due next after the termination of his interest, proportional to the time which elapsed between the day for the previous payment and the day of such termination: Provided that no person becoming entitled in possession to any estate or interest in the land shall be liable, as between himself and the persons entitled to the rent-charge, to pay any arrears of the charge remaining unpaid at the time of his becoming so entitled in possession beyond the amount of two years payment of such charge: Provided also, that the amount paid by any person in respect of such arrears, and any costs occasioned by non-payment thereof, shall be a debt from the person who in the first instance ought to have paid the same, from his estate, to the person who paid the same, and shall be recoverable accordingly.

27 & 28  
Vict. c.  
114,  
**§ 66.**

Apportion-  
ment  
between  
successive  
owners.

## CHARGES—TENANTS' LIABILITY.

**67.** If any tenant or occupier at a rent join in the application for an improvement, or by writing under his hand signify to the commissioners, or to an assistant commissioner or engineer, his consent to become charged with the charge, an apportioned part thereof as hereinafter mentioned, such tenant or occupier shall during his tenancy or occupation be liable to pay the charge, or an apportioned part thereof as hereinafter mentioned; and in case the charge be made in respect of the improvement as well of other land as of the land included in such tenancy or occupation, the commissioners may, upon such consent of the tenant or occupier, order in the absolute order what portion of the whole charge payable in respect of the improvement shall be payable by such tenant or occupier during his tenancy or occupancy in respect of the probable improvement of the land included in his tenancy or occupation; but, except as said, every tenant or occupier who pays such charge

27 & 28  
Vict. c.  
114,  
**§ 67.**

Tenant  
may de-  
duct rent-  
charge,  
unless he  
has agreed  
to pay it.

27 & 28  
Vict. c.  
114,  
**§ 67.** shall be entitled to deduct the amount thereof from the rent payable by him to the landowner, and shall be allowed the same in account with him.

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#### APPORTIONMENT AND RELEASE OF CHARGES.

27 & 28  
Vict. c.  
114,  
**§ 68.** **68.** If at any time land charged under this Act, or under any other Act authorising the creation of charges by the commissioners, is occupied in separate farms or other holdings, or has become the property of separate owners, or the owner thereof is entitled thereto under separate titles or for distinct and separate interests, or is desirous to sell or dispose of part of such land, or part only of such land is subject to any mortgage or other incumbrance, or for any other reason it would be desirable that the charge should be apportioned or a part of the land charged released therefrom, the commissioners may, with the consent of the landowner, or if the land has become the property of separate owners, or a part thereof is subject to any mortgage or incumbrance, then upon the application of any one of such owners, or of such mortgagee or incumbrancer, but in every case with due notice to the grantee or assignee of the charge, or the husband, guardian, tutor, curator, committee, or trustee of such grantee or assignee, if a married woman, infant, lunatic, idiot, or furious or fatuous person, and to such other parties (if any) as the commissioners think right, either release from such charge any part of the land charged therewith, or apportion such charge so that a separate and distinct charge may become charged on each separate farm or holding, or on the land of each landowner, or on the land held under each separate title or for each distinct and separate interest, or on the part or each part which the landowner is desirous to sell or dispose of and the part intended to be retained by him, or on the part subject to such mortgage or other incumbrance and on the residue, or on any other separate parts of the land, but so that no charge charged under such apportionment shall be

Rents-charge may be apportioned, or part of the land charged released therefrom.

less than twenty shillings for each half-yearly payment: Provided that no lands shall, in consequence of any such apportionment or release, become charged with any greater amount than that to which, in the opinion of the commissioners, they have been durably benefited by the improvements in respect of which such charge was created.

27 & 28  
Vict. c.  
114,  
**§ 68.**

#### FORMS OF APPORTIONMENT AND RELEASE.

**69.** Every such apportionment or release shall be made by an order under the hands and seal of the commissioners, and shall be in the form<sup>1</sup> set out in Schedule (D.) or (E.) to this Act, as the case may be, or as near thereto as circumstances will permit, and as to lands in England and Wales, or in Ireland or Scotland, shall be registered in the manner mentioned in the fifty-fourth section<sup>2</sup> hereof, or as near thereto as circumstances will permit; and a copy of every such order shall be authenticated by the seal of the commissioners, and shall be kept by them; and such copy, or any copy thereof authenticated by their seal, shall be conclusive evidence in all courts and for all purposes of the contents and report of the same order, and of the validity of the apportionment or release thereby expressed to be made; and such order shall take effect from the date thereof, subject to the continuance of all rights and remedies for the recovery of debts which before the date thereof may have become payable out of any lands under the charge so apportioned or released.

27 & 28  
Vict. c.  
114,  
**§ 69.**

Form,  
registry,  
and effect  
of orders  
of appor-  
tionment  
and  
release.

For these forms, see pp. 608—9, *post*.

For s. 54, see p. 584, *ante*.

#### EFFECT OF APPORTIONMENT, ETC.

**70.** Every charge apportioned or released as aforesaid shall be recoverable out of the lands on which the same is charged in the order of apportionment, or which shall not by the order of release be released therefrom, in the same manner as

27 & 28  
Vict. c.  
114,  
**§ 70.**

Charges

27 & 28  
Vict. c.  
114,

**§ 70.**

apportioned, or from which part of the lands have been released, to be deemed original charges.

27 & 28  
Vict. c.  
114,  
**§ 71.**

Several charges may be dealt with in one order of apportionment or release.

27 & 28  
Vict. c.  
114,  
**§ 72.**

Upholding improvements. Improvements to be upheld, and condition thereof certified if required.

if the same had been originally charged on such lands respectively, and shall, for all the purposes of this Act, or of the Act under which the original charge was created, be deemed to be an original charge on such lands by absolute order.

#### APPORTIONMENT, ETC., OF SEVERAL CHARGES.

**71.** Where any lands are charged by more than one absolute order, any order of apportionment or release under the preceding sections hereof may comprise all or any number of the rent-charges existing by virtue of such absolute orders.

#### MAINTENANCE OF IMPROVEMENTS.

And with regard to the upholding improvements under this Act, be it enacted as follows :

#### LANDOWNER'S LIABILITY.

**72.** So long as any land shall continue charged with any charge hereunder, the person for the time being bound to make the periodical payments of such charge shall uphold the improvements and works in respect of which such charge is made, and shall keep clear and open the outfalls and watercourses of all the drains (if any), and shall, if required either by the commissioners or by any person who shall for the time being be interested in such charge under any assignment or mortgage thereof, once in every year certify to the commissioners the state of such improvements and works, and of such outfalls and watercourses (if any); and if such person shall not so keep and uphold such improvements and works, and such outfalls and watercourses (if any), or shall fell, or cause, or knowingly permit to be felled, except in proper thinning, any trees planted under the authority of this Act as an improvement, he shall be liable to an action on the case, in the nature of an action of waste, for the damage thereby occasioned, at the suit of any person entitled to any estate in remainder or reversion in such lands.

## LANDOWNER'S POWER OF ENTRY.

**73.** Every person for the time being bound to make the periodical payments of any charge may from time to time, by himself, his engineers, surveyors, agents, servants, and workmen, enter upon any lands in, through, or upon which any of the works have been executed, to ascertain the condition of the works, and to maintain and repair the same, nevertheless paying to the person for the time being enabled by this Act to sell or grant any easement in such lands, in case the parties differ about the same, such compensation as shall be determined by two justices or the sheriff, as provided in the "Lands Clauses Consolidation Act, 1845," or the Lands Clauses Consolidation (Scotland) Act, 1845," for settlement by justices and sheriffs respectively of questions disputed compensation: Provided that as to any lands adjoining or near the land improved, to which the provisions of the Acts of the tenth and eleventh years of the reign of the present Majesty, chapters thirty-eight and one hundred thirteen, and those of the Third Part of the Land Drainage Act, 1861, are hereinbefore respectively made applicable, the powers of entry upon such lands for any of the purposes aforesaid shall be subject to and be regulated by the provisions of those Acts respectively.

27 & 28  
Vict. c.  
114,  
**§ 73.**

Power to enter on neighbouring lands for repair of works, making compensation.

## INSURANCE.

When any farmhouses, farm buildings, or works susceptible of damage by fire shall have been erected, improved, or added to under this Act, then, so long as any land shall be charged under this Act in respect thereof, the person for the time being bound to make the yearly or other periodical payments of such charge shall insure and keep insured against damage by fire all such farmhouses, farm buildings, and works in an amount equal to the principal originally secured by such charge at the least; and the person shall once in every year certify to the commission the fact of such insurance, and the particulars thereof,

27 & 28  
Vict. c.  
114,  
**§ 74.**

Farm-houses, &c., to be insured. Power to insure in case of default.



27 & 28  
Vict. c.  
114,  
**§ 74.**

and that the premium and duty for such insurance for the year then current have been duly paid; and if such person shall not insure or keep insured such farmhouses, farm buildings, and works, or shall not duly certify the matters aforesaid, it shall be lawful for the person entitled to the charge for the time being, with the assent of the commissioners, to insure against damage by fire the said farmhouses, farm buildings, and works in an amount not exceeding the principal amount originally secured by such charge, and either in the name of the person by whom such default shall have been made, or in the name of the landowner mentioned in the absolute order, and thereafter to keep the same insured during the continuance of the said charge; and the person for the time being bound to make the periodical payments of such charge shall from time to time, on the day on which the next payment shall become due on the said charge, repay to the person for the time being entitled to the said charge any sums so paid by him for premium and duty on such insurance; and in default of such payment, the amount of such premium and duty, with interest thereon at the rate of five pounds per centum per annum from the time of such default, may be recovered by the last-mentioned person by the same means and in the like manner as if the same had been payable as part of the said charge.

This section also applies to houses built or improved under the Limited Owners Residences Act, 1870 and 1871 (*g*).

#### COMPELLING MAINTENANCE OF IMPROVEMENTS.

27 & 28  
Vict. c.  
114,  
**§ 75.**

Inclosure  
Commis-  
sioners  
may  
compel  
main.

**75.** If it shall be represented to the commissioners that the person for the time being bound to make periodical payments of any charge created under this or any other existing Act authorising the advance of money for the improvement of land has neglected to uphold and maintain the improvements in respect of which the charge was executed, or any of them, the commissioners may, upon security being given for

(*g*) 33 & 34 Vict. c. 56 and 34 & 35 Vict. c. 84, p. 611, *post*.

such an amount as they may consider necessary to cover any expenses that may be incurred by them, cause an inspection of the works to be made by an assistant commissioner, engineer, or surveyor.

27 & 28  
Vict. c.  
114,  
**§ 75.**

tenance of  
improve-  
ments.

After such inspection, if the commissioners are satisfied that the improvements have not been upheld and maintained, they shall cause notice to be given to the person bound to make the said periodical payments requiring him to execute the works necessary to uphold and maintain the same within three calendar months from the time of giving such notice.

If such works shall not be executed to the satisfaction of the commissioners within such three months, they may cause such works as in their judgment shall be necessary to uphold and maintain such improvements to be executed by a person appointed by them.

The costs thereof, including the expenses of the assistant commissioner, engineer, or surveyor, shall be repaid by the person bound to make the said periodical payments to the person entitled to the charge, on request, and in default thereof the amount so certified may be recovered, with all expenses incidental to the recovery thereof, in the name of the person for the time being entitled to the charge, by the same means and in the like manner as if the same had been payable as part of the said charge.

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RELEASE FROM MAINTENANCE OF IMPROVEMENTS.

**76.** If it shall be represented to the commissioners that it is not expedient or necessary that any works for the cost of which there shall be a subsisting charge, or any part of such works, should be upheld or maintained, the commissioners may, on having deposited with them a sum, to be fixed by them, to cover all expenses, cause the said works to be inspected by an assistant commissioner, engineer, or surveyor. If after such inspection and notice to the parties who were served with notice of the application to charge the land or their representatives, and such other persons, if any, as the

27 & 28  
Vict. c.  
114,  
**§ 76.**

Inclosure  
Commissioners  
may give  
relief from  
mainte-  
nance of  
improve-  
ments.

27 & 28  
Vict. c.  
114,  
§ 76.

commissioners may direct, the commissioners shall find and certify that it is not expedient or necessary that the w rks or any of them should be upheld or maintained, thereupon the person for the time being bound to make the said periodical payment shall be relieved from all liability in respect of the maintenance of the works referred to in the commissioners certificate.

#### ABANDONED AND DECAYED WORKS.

27 & 28  
Vict. c.  
114,  
§ 77.  
Admiralty  
may  
remove  
works  
abandoned  
or fallen  
into decay.

77. If any embankment or work constructed under the powers of this Act in, under, over, through, or across any tidal water or navigable river, or if any portion of any embankment or work which affects or may affect any such water or river, or the access thereto, shall be abandoned, or suffered to fall into disuse or decay, it shall be lawful for the Admiralty or the Board of Trade, as the case may require, to abate and remove the same, or such part or parts thereof as he or they may at any time or times deem fit and proper, and to restore the site thereof to its former condition, at the cost and charge of the landowner, the amount of which cost and charge shall be a debt due from the landowner to the Crown, and be recovered accordingly, with costs of suit.

#### SUBSCRIPTION TO RAILWAYS, ETC.

Subscription  
to  
railways.

And with regard to charging lands with money subscribed for the construction of railways,<sup>1</sup> be it enacted as follows:

#### APPLICATION TO COMMISSIONERS.

27 & 28  
Vict. c.  
114,  
§ 78.  
Conditions  
for appli-  
cation to  
commis-  
sioners.

78. In case any landowner shall be desirous of subscribing for any shares or stock in the capital, whether original or additional, of a company having power to construct a railway or navigable canal, or any branch or extension railway or navigable canal, or any deviation of a line of railway or a navigable canal already sanctioned, the works for which such subscription is to be made being unfinished, or in any additional capital to be raised for the completion of any such

railway, canal, branch, extension, or deviation, the same being upon or near to and which will improve or benefit the lands of such landowner, and who shall be desirous that such amount, or any part thereof, may be charged upon the lands so to be improved, it shall be lawful for him to apply to the commissioners for that purpose within the time limited by the Railway or Canal Company's Act or Acts for the construction of the works in question.

27 & 28  
Vict. c.  
114,  
**§ 78.**

<sup>1</sup> These provisions also apply to waterworks. See p. 620, *post*.

#### INQUIRIES, ETC., BY COMMISSIONERS.

**79.** If the commissioners shall think fit to entertain such application, they shall cause all such inquiries to be made, and take all such other steps, as shall seem to them expedient for obtaining information as to the circumstances; and all the provisions of the thirteenth,<sup>1</sup> fourteenth,<sup>1</sup> fifteenth,<sup>1</sup> seventeenth,<sup>2</sup> eighteenth,<sup>2</sup> twentieth,<sup>3</sup> twenty-first,<sup>3</sup> twenty-second,<sup>3</sup> twenty-third,<sup>3</sup> twenty-fifth,<sup>3</sup> and fifty-first<sup>4</sup> sections of this Act shall apply to the case as though an improvement were to be made of the lands proposed to be charged.

27 & 28  
Vict. c.  
114,  
**§ 79.**

Commis-  
sioners  
proceed-  
ings on  
applica-  
tion.

<sup>1</sup> Pp. 560—1, *ante*.

<sup>2</sup> These sections are repealed.

<sup>3</sup> Pp. 565—6, *ante*.

<sup>4</sup> P. 583, *ante*.

#### RAILWAYS.—PROVISIONAL ORDER.

**80.** If the commissioners shall be satisfied that the railway or canal, when constructed and open for traffic, will effect a permanent increase of the yearly value of the lands exceeding the yearly amount proposed to be charged thereon, they shall execute and deliver to the landowner a provisional order, under their seal and the hands of two of them, expressing their sanction of the charge proposed; and such order shall be made as near to the form set forth in the Schedule (A.) to this Act as the circumstances will permit, and shall, with the right to a charge thereby created, be assignable by en-

27 & 28  
Vict. c.  
114,  
**§ 80.**

Pro-  
visional  
order sanc-  
tioning the  
charge.

27 & 28  
Vict. c.  
114,  
**§ 80.**

dorsement, either absolutely or by way of security, to any company or person that may agree to advance, by paying the same to the railway or canal company, the amount authorised to be charged, and notice of such assignment shall be given to the commissioners, and shall be registered by them.

For this form, see p. 606, *post*.

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RAILWAYS.—IMPROVEMENT COMPANIES.

27 & 28  
Vict. c.  
114,  
**§ 81.**

Companies  
empowered  
to lend.

**81.** Every company empowered by Act of Parliament to lend money for the improvement of land is hereby empowered to advance, by paying the same to the railway or canal company, any money authorised to be charged in manner aforesaid.

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RAILWAYS.—ABSOLUTE ORDER.

27 & 28  
Vict. c.  
114,  
**§ 82.**

Commis-  
sioners  
absolute  
order and  
its con-  
ditions.

**82.** When the railway or canal shall have been completed and opened throughout for public traffic, and as many shares in the capital of the railway or canal company subscribed for or held as aforesaid by the landowner as shall be equal in nominal amount to the money authorised to be charged shall have been fully paid up, and the certificates for such shares shall have been deposited by the landowner with the commissioners, the commissioners shall, by an absolute order under their hands and seal, execute to the landowner or his assignees a charge upon the inheritance or fee of the lands in question of the amount authorised as aforesaid to be charged, and may, if the landowner shall so desire, include, with the principal money so charged, the costs, charges, and expenses of the application and orders, and of any advance which may have been made to him of the amount authorised to be charged, and such settled or taxed costs and interest as mentioned in the fiftieth section hereof, subject nevertheless to the proviso in the same section contained.

## RAILWAYS.—FORM, ETC., OF ABSOLUTE ORDER.

**83.** Such absolute order shall be made in the form in the Schedule (B.) to this Act annexed, or as near thereto as the circumstances will permit, and all the provisions of this Act relating to absolute orders, whether in respect of the form or effect of such charges or orders or otherwise, except only the provisions for the apportionment and release of such charges, shall apply to absolute orders under the last preceding section as far as the circumstances admit.

27 & 28  
Vict. c.  
114,  
**§ 83.**

Form and  
effect of  
absolute  
order.

For this form, see p. 606, *post*.

## RAILWAYS.—NOTICE BY LANDOWNER.

**84.** The landowner shall forthwith give notice to the railway or canal company of the execution of such absolute order, and of the deposit of such certificates with the commissioners, and thereupon the company shall make an entry or memorial in their register of shareholders with respect to such shares of the fact of such absolute order having been executed.

27 & 28  
Vict. c.  
114,  
**§ 84.**

Notice  
thereof to  
be entered  
in register  
of share-  
holders.

## RAILWAYS.—TITLE TO SHARES.

**85.** From the time of such notice, and during the whole term of the charge created by such absolute order, the person who for the time being shall be bound to make the periodical payments of such charge shall be entitled to the said shares, and if the same shall not at the time being be registered in his name, the person registered as the holder thereof shall, as between himself and the person so entitled, hold them in trust for such last-mentioned person.

27 & 28  
Vict. c.  
114,  
**§ 85.**

Person  
liable to  
pay charge  
to be en-  
titled for  
the time  
being to  
the shares,

## RAILWAYS.—REGISTRATION OF SHARES.

27 & 28  
 Vict. c.  
 114,  
**§ 86.**

and to  
 have them  
 stand in  
 his own  
 name.

**86.** The person so for the time being entitled may at any time require the person registered as the holder of the said shares, or his representatives, to transfer to him the said shares, and such transfer shall thereupon be made accordingly, but at the expense in all respects of the transferee; and upon the production of such transfer duly stamped, and of a certificate by the commissioners under their hands and seal that the transferee is the person at the time being bound to make the periodical payments of the said charge, the railway or canal company shall register such transfer.

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## RAILWAYS.—RIGHTS OF SHAREHOLDERS.

27 & 28  
 Vict. c.  
 114,  
**§ 87.**

Rights and  
 duties of  
 persons  
 registered  
 for the  
 time being  
 in respect  
 of the  
 shares.

**87.** With the exception of such transfers as may from time to time be made for the purpose of transferring the shares to the person so for the time being entitled thereto, the said shares shall not under any circumstances be transferred or disposed of by the registered holder, whether he be the person for the time being entitled thereto or not, during the term of the said charge; but during the term of such charge the registered holder for the time being of the said shares shall have all the other rights and powers of a shareholder in the railway or canal company in respect of the said shares; and the railway or canal company shall not be bound to see to the application of any dividend received by such registered holder, but as between himself and the person or persons for the time being entitled to such shares he shall hold any dividend which may be received by him in trust for the person who, at the time when such dividend became payable, was the person entitled to the said shares.

## RAILWAYS.—APPROPRIATION OF SHARES.

**88.** Whenever any person or those whom he legally represents as their executor or administrator shall have been bound to make, and shall have made, such and so many periodical payments of the charge as to repay thereby principal money which, in proportion to the whole amount of principal money charged and the whole number of the said shares, shall correspond to any integral number of shares, with or without a fraction over, it shall be lawful for the commissioners, on the application of such person, made either during the term of the charge or within two years after its expiration, to certify that act under their hands and seal, and by the same certificate to appropriate to such person certain specified shares to such integral number, and to deliver to him the corresponding share certificates; and upon the production to the railway or canal company of such certificate by the commissioners and share certificates, it shall be lawful for such person, if he shall not already be the registered holder, to require such shares to be transferred to him, and the railway or canal company shall make an entry or memorial on their register of shareholders of such shares being freed from the provisions of this Act, or the term of the charge having expired, as the case may be, and such shares shall thenceforward be held and transferred in the same manner as any other shares in the same company, and if the term of the charge shall not have expired the three preceding sections of this Act shall still apply to the residue of the shares to which the same charge shall relate.

27 & 28  
Vict. c.  
114,  
**§ 88.**

Entire  
shares to  
belong to  
parties in  
proportion  
to their  
payments,  
and to be  
released to  
them from  
time to  
time.

## RAILWAYS.—UNCLAIMED SHARES.

**89.** The shares composing the said residue shall at the end of two years after the expiration of the term of the charge belong to the person who shall have been bound to make the periodical payment of the charge, or to his executors or administrators, on such payment being made; and the com-

27 & 28  
Vict. c.  
114,  
**§ 89.**

Shares not  
claimed



27 & 28  
Vict. c.  
114,  
§ 89.

within two  
years from  
expiration  
of term to  
belong to  
person  
bound to  
make last  
payment  
of charge.

missioners shall deliver to him or them the corresponding share certificates, and certify the title to the shares under their hands and seal in accordance with the above provision ; and upon the production to the railway or canal company of the share certificates and such certificate by the commissioners, such person as aforesaid, or his executors or administrators, shall have the said shares transferred to him or them, so far as he or they shall not be already the registered holder or holders thereof; and the railway or canal company shall make an entry or memorial on their register of shareholders of the term of the charge having expired, and thenceforward the said shares shall be held and transferred in the same manner as any other shares in the same company.

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TABLE OF FEES.

27 & 28  
Vict. c.  
114,  
§ 90.

*Inclosure  
Commis-  
sioners to  
cause a  
table of fees  
to be pre-  
pared and  
submitted  
to Treasury  
for ap-  
proval.*

*90. And whereas it is expedient that a table or tables of fees proper to be taken by the Inclosure Commissioners in respect of documents issuing out of their office by virtue of the provisions of this Act should be prepared : Be it enacted, that it shall and may be lawful for the said Inclosure Commissioners to prepare or cause to be prepared a table or tables of fees, specifying what fees are proper to be demanded and taken in the office of the said Inclosure Commissioners in respect of any forms, orders, or documents prepared in or issued from such office by virtue of the provisions of this Act ; and such table or tables shall be laid before the Commissioners of Her Majesty's Treasury, who shall have power to revise and settle the same, and from time to time to alter or amend the same, as they may deem necessary and proper, and the said table or tables of fees, so revised, settled, altered, or amended, from time to time to approve and allow ; and the said Inclosure Commissioners are required, so soon and as often as each table or tables of fees shall have been approved and allowed, to cause the same to be inserted and published in the London Gazette, and from and after such*

*publication, such fees may be legally demanded, and may be received and recovered, by any person appointed by the said Inclosure Commissioners to receive or recover the same.*

27 & 28  
Vict. c.  
114,  
**§ 90.**

This section was repealed by the Statute Law Revision Act, 1875 (h).

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FEES TO BE PAID OVER TO TREASURY.

**91.** *The said Inclosure Commissioners shall cause the fees received by them under the authority of this Act to be duly and regularly entered in one or more books to be kept for that purpose, distinguishing the fees received under their several heads, and shall render a true and faithful account thereof to the Commissioners of Her Majesty's Treasury at such times, and in such form of account, and with such particulars of receipt or otherwise, and accompanied by such vouchers, as the said Commissioners of Her Majesty's Treasury shall from time to time require; and the said Inclosure Commissioners shall from time to time, when required to do so by the said Commissioners of Her Majesty's Treasury, cause the amount of such fees to be paid into the receipt of the Exchequer to the credit of the Consolidated Fund of the United Kingdom of Great Britain and Ireland.*

27 & 28  
Vict. c.  
114,  
**§ 91.**

Officers to  
render  
account of  
fees received  
to the  
Treasury.

To be paid  
over to the  
Consoli-  
dated  
Fund.

This section was repealed by the Statute Law Revision Act, 1875 (i).

(h) 38 & 39 Vict. c. 66, s. 1.

(i) 38 & 39 Vict. c. 66, s. 1.

SCHEDULES to which the foregoing Act refers.

SCHEDULE (A).

Provisional Order.

27 & 28  
Vict. c.  
141,  
Sched. A.

*(Proper Heading.)*

The Inclosure Commissioners for England and Wales, in pursuance of "The Improvement of Land Act, 1864," do, by this order under their hands and seal, sanction the proposed improvements expressed upon the terms and conditions that such improvements be executed in the manner mentioned or specified in the said contract, and at an expense not exceeding the sum of \_\_\_\_\_, and do hereby declare and provisionally order that it is right and proper, and for the benefit of the parties interested in the lands mentioned in the schedule hereto, that the inheritance or fee of such lands should be charged with the said sum of \_\_\_\_\_, together with the costs, charges, and expenses preparatory or in relation to and consequent on the said contract and the application for this order, and that the same should, to the whole amount of such respective moneys [or should, to any amount not exceeding \_\_\_\_\_ as the case may be], be charged in the manner following; (that is to say,) *[here express how the amount is to be repaid, with interest.]*

In witness whereof they have hereunto affixed their hands and seal, this \_\_\_\_\_ day of \_\_\_\_\_, in the year of our Lord, One thousand eight hundred and \_\_\_\_\_.

SCHEDULE of Lands provisionally charged.

Name, &c., of Lands.	Land- owner.	Occupier.	Parish.	County.	Total Acreage.	Total Rental.

SCHEDULE (B).

The Improvement of Land Act, 1864.

27 & 28  
Vict. c.  
114,  
Sched. B.

County of \_\_\_\_\_  
Parish of \_\_\_\_\_  
No. \_\_\_\_\_

Absolute Order.

*[Here insert name of landowner]* of *[here insert address]*  
Loan of \_\_\_\_\_ pounds for the improvement of \_\_\_\_\_ in  
the parish of \_\_\_\_\_ in the county of \_\_\_\_\_.

The Inclosure Commissioners for England and Wales, in pursuance of  
'The Improvement of Land Act, 1864," do, by this absolute order under  
their hands and seal, charge the inheritance or fee of the lands mentioned  
in the schedule hereto, with the payment to of the yearly  
sum of pounds shillings and  
pence, payable half-yearly on the day of and  
the day of in every year, for the term of  
years, and being a proportionate re-payment, according to  
the table annexed, of the capital sum of pounds, with in-  
terest at per cent. per annum, the first half-yearly payment to be  
made on the day of  
Dated this day of , 18 .

27 & 28  
Vict. c.  
114,  
Sched. B.

SCHEDULE of Lands charged.

Name, &c., of Lands.	Land- owner.	Occupier.	Parish.	County.	Total Acreage.

TABLE.

Half-yearly Payments.	Proportionate Repayments of the Loan.	Interest at £ per cent. per Annum.

SCHEDULE (C).

Assignment of a Charge.

per Heading.)  
A. B., &c., in pursuance of "The Improvement of Land Act, 1864,"  
by, in consideration of [state the consideration], assign to C. D., of, &c.,  
executors, administrators, and assigns, the charge of the sum of £  
interest at the rate of, &c. [or the charge of, &c., as the case may be],  
which by virtue of the absolute order, No. [ ], executed by the  
Inclosure Commissioners for England and Wales, and dated, &c., is an  
absolute charge on the inheritance of the lands mentioned in the schedule  
hereto, and all the powers, authorities, rights, and remedies of  
reference to such charge. [Here add such clauses and provisions, if  
as are agreed on between the parties.]  
Witness, &c., this day of .  
(L. S.)

27 & 28  
Vict. c.  
114,  
Sched. C.

27 & 28  
Vict. c.  
141,  
Sched. C.

SCHEDULE of the Lands charged.

Name, &c., of Lands.	Landowner.	Occupier.	Parish.	County.

SCHEDULE (D).

Form of Order for apportioning Charges.

The Improvement of Land Act, 1864.

27 & 28  
Vict. c.  
114,  
Sched. D.

County of  
Parish of  
Whereas, by an absolute order under this Act, dated the  
day of and numbered the lands mentioned in  
the first and second schedules hereto were charged with the payment to  
of the yearly sum of payable half-yearly for  
the term of years:  
And whereas, upon application made to them, the Inclosure Com-  
missioners for England and Wales see fit to apportion the said charge:  
Now therefore the said Inclosure Commissioners, in pursuance of  
"The Improvement of Land Act, 1864," do, by this order under their  
hands and seal, charge the inheritance or fee of the lands mentioned in  
the first schedule hereto with the payment to of the yearly  
sum of pounds shillings and pence,  
payable half-yearly on the day of and the  
day of in every year, for the term of  
years, being a proportionate repayment, according to the table to the  
same schedule annexed, of the capital sum of pounds, with  
interest at per cent. per annum, the first half-yearly payment to  
be made on the day of ; and do also charge  
the inheritance or fee of the lands mentioned in the second schedule  
hereto with the payment to of the yearly sum of  
pounds shillings and pence, payable half-yearly  
on the day of in every year, for the term of  
years, being a proportionate repayment, according to the  
table to the same schedule annexed, of the capital sum of  
pounds, with interest at per cent. per annum, the first half-  
yearly payment to be made on the day of ;  
and do further release and exempt the said lands respectively from the  
respective residue of the said charge created by the above-mentioned  
absolute order.  
Dated this day of .

FIRST SCHEDULE.

28 & 29  
Vict. c.  
114,  
Sched. D.

Name, &c., of Lands.	Land- owner.	Occupier.	Parish.	County.	Total Acreage.

TABLE.

Half-yearly Payments.	Proportionate Repayments of the Loan.	Interest at      per cent. per Annum.

SECOND SCHEDULE.

Name, &c., of Lands.	Land- owner.	Occupier.	Parish.	County.	Total Acreage.

TABLE.

Half-yearly Payments.	Proportionate Repayment of the Loan.	Interest at      per cent. per Annum.

SCHEDULE (E).

*Form of Order for exempting Lands.*

The Improvement of Land Act, 1864.

y of  
of  
areas, by an absolute order under this Act, dated the  
and numbered the lands mentioned in  
st and second schedules hereto were charged with the payment to

28 & 29  
Vict. c.  
114,  
Sched. E.

R R

**114,  
Sched. E.**

And whereas, upon application made to them, the Inclosure Commissioners for England and Wales see fit to release and exempt from such charge such of the said lands as are particularised in the first schedule hereto :

Now therefore the said Inclosure Commissioners, in pursuance of "The Improvement of Land Act, 1864," do, by this order under their hands and seal, release and exempt the said lands mentioned in the first schedule hereto from the charge created by the above-mentioned absolute order, and from all liability thereto, and do hereby declare that the said charge applies to and continues in force as to the lands particularised in the second schedule hereto only.

Dated this                      day of

## SCHEDULE.

### SCHEDULE I. (Lands exempted.)

Name, &c., of Lands.	Land- owner.	Occupier.	Parish.	County.	Total Acreage.

**SCHEDULE II. (Lands still subject to Rent-charge.)**

Name, &c., of Lands.	Land- owner.	Occupier.	Parish.	County.	Total Acreage.

## SCHEDULE (F).

### ***Vesting Order.***

27 & 28  
Vict. c.  
114,  
Sched. F.

In witness whereof they have hereunto affixed their hands and seal,  
this                      day of                      , in the year one thousand eight  
hundred and                      .

# THE LIMITED OWNERS RESIDENCES ACTS, 1870 AND 1871.

---

33 & 34 VICT. c. 56.  
34 & 35 VICT. c. 84.

---

33 & 34 VICT. c. 56.

*An Act to enable the owners of Settled Estates in England and Ireland to charge such estates, within certain limits, with the expense of building mansions as residences for themselves.*

WHEREAS by an Act of the tenth year of the reign of His late Majesty King George the Third, chapter fifty-one, heirs of entail in Scotland are enabled to charge their estates with sums of money laid out by them in building mansions as residences for themselves :

33 & 34  
Vict. c. 56,  
Preamble.

---

And whereas such enactment having been found beneficial in that part of the United Kingdom, it is expedient to enable limited owners in other parts of the United Kingdom to build mansions on their estates as residences for themselves :

Be it therefore enacted, &c.

---

## SHORT TITLE, ETC.

1. This Act may be cited for all purposes as the "Limited Owners Residences Act, 1870."

33 & 34  
Vict. c. 56,  
§ 1.

---

Short title.



33 & 34  
Vict. c. 56,  
§ 1.

34 & 35  
Vict. c. 84,  
Preamble.

This Act was amended in 1871 by the Act 34 & 35 Vict. c. 84, the preamble and first sections of which are as follows:—

34 & 35  
Vict. c. 84,  
Preamble.

[Whereas doubts have arisen as to the meaning and construction of section three of “The Limited Owners Residences Act, 1870,” and it is expedient to repeal the said section, and make other provisions instead thereof:]

Be it therefore enacted, &c.

34 & 35  
Vict. c. 84,  
§ 1.

[1. This Act may be cited for all purposes as “The Limited Owners Residences Act (1870) Amendment Act, 1871.”]

Short title.

#### CONSTRUCTION OF ACTS.

33 & 34  
Vict. c. 56,  
§ 2.

Act to be  
construed  
with  
27 & 28  
Vict. c.  
114, “Im-  
provement  
of Land  
Act, 1864.”

2. This Act shall be construed as one with the Act of the session of the twenty-seventh and twenty-eighth years of the reign of Her present Majesty, intituled “Improvement of Land Act, 1864,” and the words used in this Act shall be construed in like manner as in the said Act; and the provisions of the said Act shall be applicable, as far as the nature of the case requires, except as is herein otherwise provided, to proceedings under this Act.

Sect. 4 of the Act of 1871 is as follows:—

34 & 35  
Vict. c. 84,  
§ 4.

Construc-  
tion of  
Act.

[4. “The Limited Owners Residences Act, 1870,” as amended by this Act, and this Act shall be construed together as one Act.]

The Improvement of Land Act, 1864, will be found at p. 550, *ante*.

33 & 34  
Vict. c. 56,  
§ 3.

What to be  
deemed im-  
provements  
within  
meaning of  
“Improve-  
ment of  
Land Act,  
1864.”

3. *The erection of mansion houses and such other usual and necessary buildings, outhouses, and offices as are commonly appurtenant thereto and held and enjoyed therewith, and completion of mansion houses and such appurtenances as aforesaid, and improvement of and addition to mansion houses and such appurtenances as aforesaid already erected, or the improvement of and addition to houses which are capable of being converted into mansion houses suitable to the estate on which they stand, so as such improvement*

*and addition be of a permanent nature, provided the mansion houses so erected or enlarged or converted are suitable to the estate on which they stand as residences for the owners of such estate, shall be improvements within the meaning of the "Improvement of Land Act, 1864."*

33 & 34  
Vict. c. 56,  
**§ 3.**

This section was repealed by the Act of 1871, which was passed on the 16th of August, 1871, and ss. 2 and 3 of which are as follows:—

REPEAL.

[2. From and after the passing of this Act, sections three and six of "The Limited Owners Residences Act, 1870," shall be and the same are hereby repealed.]

34 & 35  
Vict. c. 84,  
**§ 2.**

Repeal of  
sects. 3 and  
6 of 33 & 34  
Vict. c. 56.

MANSION TO BE AN "IMPROVEMENT."

3. The erection of a mansion house and such other usual and necessary buildings, outhouses, and offices as are commonly appurtenant thereto and held and enjoyed therewith, and the completion of any mansion house and such appurtenances as aforesaid, and the improvement of and addition to any mansion house and such appurtenances as aforesaid already erected, and the improvement of and addition to any house which is capable of being converted into a mansion house suitable to the estate on which the same stands, so as such improvement and addition be of a permanent nature, provided that every such mansion house so erected or enlarged or converted is suitable to the estate on which it stands as a residence for the owner of such estate, shall be improvements within the meaning of the "Improvement of Land Act, 1864," and may, subject to the provisions of the recited Act, be charged upon such estate.

34 & 35  
Vict. c. 84,  
**§ 3.**

Mansion,  
&c., to be  
deemed im-  
prove-  
ment  
within  
meaning of  
"Improve-  
ment of  
Land Act,  
1864."

the term "estate" in this section shall include all lands upon which any of such improvements is proposed to be made, and any other lands in the neighbourhood of the same settled to the same uses.]

## MAXIMUM SUM TO BE CHARGED.

33 & 34  
Vict. c. 56,  
§ 4.

Limit as to  
sum to be  
charged for  
mansion  
houses.

4. The sum charged on any estate under settlement in respect of mansion and other buildings hereinbefore mentioned shall not exceed two years rental of the said estate, after deducting all public charges and interest of debts and other incumbrances and annuities affecting or which may affect the inheritance after the death of the limited owner, or, in the case of different estates settled to the same uses, and on which charges may have been imposed which affect the whole of such estates, after deducting from the rental of such of the said estates as may be charged with the cost of erecting mansion houses and appurtenances as aforesaid in the manner hereinafter provided, so much of the debts and other incumbrances affecting the whole of the estates as shall bear to the whole of the said debts and incumbrances the same proportion as the rental of the estates to be charged with the cost of erecting a mansion house and appurtenances shall bear to the rental of the whole of the estates settled to the same uses.

## CALCULATION OF VALUE.

33 & 34  
Vict. c. 56,  
§ 5.

Mode of  
calculating  
increased  
value  
resulting  
from out-  
lay.

5. In calculating whether the improvement would effect a permanent increase of the yearly value of the lands exceeding the yearly amount proposed to be charged thereon, the commissioners shall take into account the effect on such value of any sum expended by the landowner in erecting or adding to such mansion house and appurtenances beyond the sum proposed to be charged.

33 & 34  
Vict. c. 56,  
§ 6.

In such  
calculation,  
other lands  
settled to

6. *In making such calculation as aforesaid, and in considering the suitability of such mansion house and appurtenances so erected or enlarged as aforesaid to the estate, the commissioners may take into consideration any other lands in the neighbourhood of such estate settled to the same uses as the estate on which such mansion house and appurtenances*

*stand which, if enjoyed together therewith, would add to the letting value of such mansion house.*

33 & 34  
Vict. c. 56,  
**§ 6.**

This section was repealed by s. 2 of the Limited Owners Residences Act (1870) Amendment Act, 1871 (b) as from 16th of August, 1871.

same uses  
may be  
taken into  
account.

#### CERTIFICATE AS TO HOUSE.

7. If the commissioners shall find that the erection or improvement of or addition to any such mansion house and appurtenances are suitable to the estate, but would not in their estimation effect an increase of the yearly value of the lands exceeding the yearly amount proposed to be charged, it shall be in their discretion to certify such improvement.

33 & 34  
Vict. c. 56,  
**§ 7.**

Discretion-  
ary power  
of certify-  
ing where  
erection of  
mansion  
house suit-  
able, &c.

#### INSURANCE.

8. The provision in the Improvement of Land Act respecting assurance of buildings against fire shall apply to mansion houses and appurtenances improved or added to, as well as to those erected under this Act.

33 & 34  
Vict. c. 56,  
**§ 8.**

Insurance  
against  
fire.

See s. 74 of the Improvement of Land Act, 1864 (c).

#### PRIORITY OF CHARGES.

9. A charge on land made under this Act shall not take priority of any mortgage or other incumbrance affecting the land charged at the time such charge is made.

33 & 34  
Vict. c. 56,  
**§ 9.**

Priority of  
charges.

See and compare s. 59 of the Improvement of Land Act, 1864 (d).

#### EXTENT OF ACT.

10. This Act shall not apply to Scotland.

33 & 34  
Vict. c. 56.  
**§ 10.**

Extent of  
Act.

b) 34 & 35 Vict. c. 84.

(c) Page 596, *ante*.

(d) Page 587, *ante*.

**THE  
LIMITED OWNERS RESERVOIRS AND  
WATER SUPPLY FURTHER FACILITIES  
ACT, 1877.**

---

40 & 41 VICT. C. 31.

*An Act to give further facilities to Landowners of limited interests in England and Wales and Ireland to charge their estates with the expenses of constructing Reservoirs for the storage of Water, and other similar purposes.*

40 & 41  
Vict. c. 31,  
Preamble. WHEREAS landowners of limited interest in England and Wales, with the approval of the Inclosure Commissioners, and in Ireland of the Commissioners of Public Works in Ireland, are enabled to charge their estates with sums expended by them in constructing reservoirs and other works for the supply of water, if it can be shown to the satisfaction of the said commissioners that such works will effect a permanent yearly increase in the value of such estates for agricultural purposes exceeding the yearly amount proposed to be charged thereon, and are also enabled to charge their estates with sums subscribed for the construction of railways and navigable canals, if it can be shown to the satisfaction of the commissioners that such railways and canals will effect a permanent yearly increase in the value of such estates for any purpose exceeding the yearly amount proposed to be charged thereon:

And whereas in many places it would greatly conduce to

the affording of a plentiful supply of pure water to the inhabitants of villages and towns and to the industrial requirements of the locality, if facilities were given to landowners of limited interests to charge their estates, subject to the approval of the commissioners, with sums expended by them in constructing reservoirs and other works for the supply of water, of a character permanently to increase the value of such estates for other than agricultural purposes, or to be otherwise permanently productive of profit to the owners of the estates, and if such landowners were also enabled to charge their estates with sums subscribed by them for the construction of waterworks on the same terms and conditions as those on which they are now enabled to charge their estates with subscriptions for the construction of railways and canals:

Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. This Act may be cited as the Limited Owners Reservoirs and Water Supply Further Facilities Act, 1877.

2. This Act shall not extend to Scotland.

3. This Act shall be incorporated with the Improvement of Land Act, 1864, and the two Acts shall be read together as one Act.

4. The provisions of the Waterworks Clauses Act, 1863, with respect to the security of the reservoirs constructed by the undertakers are incorporated with this Act; and in that Act as incorporated with this Act, the expression "the special Act" shall mean and include the Improvement of Land Act, 1864, and this Act; and the expression "the undertakers" shall mean any person who constructs or erects any reservoir or dam under the authority of either of the last mentioned Acts.

40 & 41  
Vict. c. 31  
Preamble,  
§§ 1—4.

40 & 41  
Vict. c. 31,  
§ 1.

Short title.

40 & 41  
Vict. c. 31,  
§ 2.

Extent of  
Act.

40 & 41  
Vict. c. 31,  
§ 3.

Act incor-  
porated  
with 27 &  
28 Vict.  
c. 114.

40 & 41  
Vict. c. 31,  
§ 4.

Certain  
provisions  
of 26 & 27  
Vict. c. 93,  
incorpo-  
rated.

## CONSTRUCTION OF RESERVOIRS.

40 & 41  
Vict. c. 31,  
§ 5.

Reservoirs,  
&c., to be  
deemed  
improve-  
ments  
within Im-  
provement  
of Land  
Act, 1864.

5. The construction or erection of reservoirs or other works of a permanent character for the supply of water to persons residing or engaged in labour on the lands on which such works are situate, or on any other lands settled to the same uses, or for the more convenient or profitable user of such lands, or for the supply of water to any sanitary or other local authority or water company, or to any manufacturer or other person, or for any one or more of such purposes, shall be deemed to be an improvement of land within the meaning of the ninth section of the Improvement of Land Act, 1864, and shall be sanctioned by the commissioners, if it can be shown to their satisfaction that such reservoirs or works for the supply of water will for any purpose effect a permanent yearly increase in the value of the lands on which they are situate, or any other lands settled to the same uses, or will be permanently productive of a yearly revenue to the owner of such lands exceeding the yearly amount proposed to be charged thereon; and the construction of any such works shall be deemed to include the purchase by the landowner of any water right or other easement which might otherwise interfere with or prevent the construction of the same or any such supply of water as aforesaid.

In calculating whether the improvement is likely to effect a permanent increase of the yearly value of the land, or be productive of a yearly revenue to the landowner exceeding the yearly amount proposed to be charged thereon, it shall be lawful for the commissioners to take into account the value of any contract, the terms of which have been agreed upon between the landowner and any sanitary or other local authority, or water company, or manufacturer, or other persons, for the purpose of supplying such authority, company, person, or persons with water, as well as the effect on such value or revenue of any sum expended by the landowner in the construction of the

works over and above the sum proposed to be charged upon the land. 40 & 41  
Vict. c. 31,  
§ 5.

When the improvement will afford a supply of water to persons residing or engaged in labour on the lands on which the proposed works will be situate, or on any other lands settled to the same uses, the commissioners may, if they think fit, sanction the improvement, although it may not be shown that the same will effect a direct yearly increase in the value of the lands, or be productive of a yearly revenue to the owner of the lands exceeding the yearly amount proposed to be charged thereon.

#### WATER SUPPLY TO LOCAL AUTHORITY.

6. Any landowner charging or proposing to charge his estate with the cost of the construction of reservoirs or other works for the supply of water under this Act may enter into any agreement for the supply of water to any sanitary or other local authority, water company, manufacturer, or other person, for any term not exceeding the number of years during which the cost of the improvement or any part of it is made a charge upon the estate: Provided that every such agreement be approved by the commissioners, and that no premium or benefit in the nature of a premium be reserved thereby by the landowner. 40 & 41  
Vict. c. 31,  
§ 6.  
Supply of  
water to  
local  
authority,  
&c.

#### LAND COMPANIES.

7. Any company now authorised to contract with landowners in England or Wales, or in Ireland, for the execution of any works for the improvement of land, or to make advances for the purpose of executing or assisting in the execution of such works, may, with the approval of the commissioners, contract with any such landowner for the execution of any reservoirs or works of water supply, the cost of which may by this Act be charged upon the estates of such 40 & 41  
Vict. c. 31,  
§ 7.  
Power to  
contract  
for execu-  
tion of  
reservoirs,  
&c.



40 & 41  
 Vict. c. 31,  
 § 7. landowner, and may, with the like approval, make advances for the purpose of executing or assisting in the execution of such reservoirs or works; and for this purpose the execution of any such reservoirs or works shall be deemed to be an improvement of land within the meaning of any Act of Parliament or Articles of Association relating to any such company.

---

#### SUBSCRIPTIONS TO WATERWORKS.

40 & 41  
 Vict. c. 31,  
 § 8. Subscriptions to water-works. 8. Any landowner desiring to charge his estates with subscriptions for the construction of waterworks by a water company may charge his estate with such moneys on the same terms and conditions as he may under the Improvement of Land Act, 1864, charge his estates with moneys subscribed for the construction of railways or navigable canals; and for this purpose the provisions contained in sections seventy-eight to eighty-nine, both inclusive, of the Improvement of Land Act, 1864, shall apply, *mutatis mutandis*, to such subscriptions, as if the same had been subscribed for the construction of a railway or navigable canal.

For these sections, see pp. 598 to 604, *ante*.

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#### SAVING CLAUSE.

40 & 41  
 Vict. c. 31,  
 § 9. Protection of rights. 9. Nothing in this Act shall be construed to authorise any landowner, or any water company, local authority, person or persons authorised by any landowner, to injuriously affect any reservoir, canal, river, stream, or navigation, or the feeders thereof, or the supply, quality, or fall of water contained in any reservoir, canal, river, stream, or navigation, or in the feeders thereof, or any other water rights or easements in cases where any body of persons or person would if this Act had not passed, have been entitled by law to prevent or be relieved against the injuriously affecting such reservoir, canal, river, stream, navigation, feeders, or

such supply, quality, or fall of water, or other water rights or easements, unless the landowner, water company, local authority, person, or persons first obtain the consent in writing of the body of persons or person so entitled as aforesaid.

40 & 41  
Vict. c. 31,  
**§ 9.**

#### INTERPRETATION CLAUSE.

**10.** In this Act the following words and expressions shall have the following meanings; that is to say,

40 & 41  
Vict. c. 31,  
**§ 10.**

“The commissioners” means the Inclosure Commissioners of England and Wales, or the Commissioners of Public Works in Ireland as the case may require:

Defini-  
tions.

“The Improvement of Land Act, 1864,” means the 27th and 28th Vict. c. 114:

“Works for the supply of water” includes wells, pumps, reservoirs, cisterns, ponds, tanks, aqueducts, cuts, sluices, mains, pipes, culverts, machinery, and things for supplying or used in supplying water:

“Water company” means any person or body of persons, corporate or unincorporate, supplying or who may hereafter supply water for his or their own profit:

“Local authority” means any authority having jurisdiction for any public local purpose.

The several words and expressions to which by the Improvement of Land Act, 1864, meanings are assigned, shall in this Act have the same respective meanings as in that Act.

The Inclosure Commissioners are now incorporated with the “Land Commissioners for England” constituted by s. 48 of the S. L. A., 1882 (e).

(e) Page 516, *ante*.

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